Florida State University College of Law
Scholarship Repository

Staff Analysis | Florida Legislative Documents

4-7-1972

Session Law 72-35-1

Florida Senate & House of Representatives

Follow this and additional works at: https://ir.law.fsu.edu/staff-analysis

Part of the Legislation Commons

Recommended Citation
House of Representatives, Florida Senate &, "Session Law 72-35-1" (1972). *Staff Analysis*. 88.
https://ir.law.fsu.edu/staff-analysis/88

This Article is brought to you for free and open access by the Florida Legislative Documents at Scholarship Repository. It has been accepted for inclusion in Staff Analysis by an authorized administrator of Scholarship Repository. For more information, please contact efarrell@law.fsu.edu.

Journal

of the

House of Representatives

SECOND REGULAR SESSION

of the

SECOND LEGISLATURE

[under the Constitution as Revised in 1968]

FEBRUARY 1, 1972 through APRIL 7, 1972

COPY
reproduced by
FLORIDA STATE ARCHIVES
DEPARTMENT OF STATE
R. A. GRAY BUILDING
Tallahassee, Florida 32301

[Including a record of transmittal of Acts and Resolutions subsequent to sine die adjournment]

Sackett	Sweeny	Turlington	Winn
Santora	Thomas	Tyrrell	Wolfson
Savage	Tillman	Walker	Woodward
Sessums	Tittle	Westberry	Yancey
Sims	Tobiassen	Whitson	Zinkil
Singleton	Trombetta	Whitworth	
Smith	Tubbs	Williamson	
Stevens	Tucker	Wilson	

Nays—None

Representatives Baker, Dubbin, Harris, and Shaw were recorded as voting Yea and Representative Gallen was recorded as voting Nay.

So the bill passed, as amended. On motion by Mr. Firestone, the rules were waived and the bill was ordered immediately certified to the Senate, after engrossment.

HB 718—A bill to be entitled An act relating to the department of legal affairs; providing for restitution for damages caused by escapees and inmates of state institutions under the department of health and rehabilitative services; providing an effective date.

—was taken up. On motion by Mr. Mixson, the rules were waived and HB 718 was read the second time by title.

The Committee on Rules & Calendar offered the following amendment:

Amendment 1—On page 2, line 10, strike "1971" and insert: 1972

Mr. Mixson moved the adoption of the amendment, which was adopted.

On motion by Mr. Mixson, the rules were waived and HB 718, as amended, was read the third time by title. On passage, the vote was:

Yeas—102

Mr. Speaker	Forbes	Melvin	Sims
Baker	Fortune	Milburn	Singleton
Baumgartner	Fulford	Mixson	Smith
Birchfield	Gautier	Mooney	Stevens
Blackburn	Gibson	Moudry	Sweeny
Brown	Gillespie	Murphy	Thomas
Burke	Glisson	Nease	Tillman
Caldwell	Gorman	Nergard	Tittle
Carlucci	Grainger	Ogden	Tobiassen
Chapman	Grizzle	Poole	Trombetta
Clark, Dick	Gustafson	Poorbaugh	Tubbs
Clark, J. R.	Harris	Powell	Tucker
Conway	Hartnett	Randell	Turlington
Crabtree	Hector	Redman	Tyrrell
Craig	Hess	Reed	Walker
Crane	Hodes	Reeves	Whitson
Culbreath	Hollingsworth	Renick	Whitworth
D'Alemberte	Holloway	Rish	Williamson
Danahy	Johnson	Robinson, A. S.	Wilson
Dixon	Jones	Robinson, J. W.	Winn
Dubbin	Kershaw	Ryals	Wolfson
Earle	Lane	Sackett	Woodward
Elmore	Libertore	Santora	Yancey
Featherstone	Matthews, H.	Savage	Zinkil
Firestone	Mattox	Sessums	
Fleece	McDonald	Shreve	

Nays—1

Harllee

Representatives Cherry, Hazelton, and Shaw were recorded as voting Yea and Representative Gallen was recorded as voting Nay.

So the bill passed, as amended. On motion by Mr. Mixson, the rules were waived and the bill was ordered immediately certified to the Senate, after engrossment.

HB 120—A bill to be entitled An act relating to wrongful death action; amending chapter 768, Florida Statutes, by adding sections 768.16, 768.17, 768.18, 768.19, 768.20, 768.21, 768.22, 768.23, 768.24, 768.25, 768.26, and 768.27; providing for a right of action on behalf of the survivors and the estate by the personal representative of a decedent whose death is caused by the wrongful act, negligence, default, or breach of contract or warranty of any person; repealing sections 768.01, 768.02, and 768.03, Florida Statutes; providing an effective date.

—was taken up. On motion by Mr. D'Alemberte, the rules were waived and HB 120 was read the second time by title.

The Committee on Rules & Calendar offered the following amendment:

Amendment 1—On page 6, line 21, strike "January 1, 1972," and insert: July 1, 1972,

Mr. D'Alemberte moved the adoption of the amendment which was adopted.

On motion by Mr. D'Alemberte, the rules were waived and HB 120, as amended, was read the third time by title. On passage, the vote was:

Yeas—101

Mr. Speaker	Firestone	Matthews, H.	Sims
Andrews	Fleece	Mattox	Singleton
Baker	Forbes	McDonald	Smith
Baumgartner	Fortune	Melvin	Stevens
Birchfield	Fulford	Milburn	Sweeny
Blackburn	Gautier	Mixson	Thomas
Brown	Gibson	Mooney	Tillman
Burke	Gillespie	Moudry	Tittle
Caldwell	Glisson	Murphy	Tobiassen
Carlucci	Gorman	Nease	Trombetta
Chapman	Grainger	Nergard	Tubbs
Cherry	Grizzle	Ogden	Turlington
Clark, Dick	Gustafson	Poole	Tyrrell
Clark, J. R.	Harllee	Poorbaugh	Walker
Conway	Hartnett	Randell	Whitson
Crabtree	Hazelton	Redman	Whitworth
Craig	Hector	Reed	Williamson
Crane	Hess	Reeves	Wilson
Culbreath	Hodes	Renick	Winn
D'Alemberte	Hollingsworth	Rish	Wolfson
Danahy	Holloway	Robinson, A. S.	Woodward
Dixon	Johnson	Ryals	Yancey
Dubbin	Jones	Sackett	Zinkil
Earle	Kershaw	Santora	
Elmore	Lane	Savage	
Featherstone	Libertore	Shreve	

Nays—None

Representatives Gallen, Sessums, Shaw, and Tucker were recorded as voting Yea.

So the bill passed, as amended. On motion by Mr. D'Alemberte, the rules were waived and the bill was ordered immediately certified to the Senate, after engrossment.

HB 2662—A bill to be entitled An act relating to criminal procedure; creating §§901.27, 901.28, and 901.29, authorizing an arresting officer to issue a citation to appear in court in lieu of taking a person before a magistrate in misdemeanor cases; amending §901.06 and 901.23, Florida Statutes, as amended by chapter 70-339, Laws of Florida, releasing officer from duty to take a person before a magistrate when a citation to appear is issued; providing an effective date.

—was taken up. On motion by Mr. Firestone, the rules were waived and HB 2662 was read the second time by title.

The Committee on Rules & Calendar offered the following amendment:

Amendment 1—In title, line 9, after the semicolon insert: providing a penalty;

Mr. Firestone moved the adoption of the amendment, which was adopted.

STATE OF FLORIDA

JOINT LEGISLATIVE MANAGEMENT COMMITTEE

DIVISION OF STATUTORY REVISION

May 16, 1972

SENATOR GEORGE L. HOLLAHAN, JR. - CO CHMN.
REPRESENTATIVE MURRAY H. DUBBIN - CO CHMN.
SENATOR MALLORY E. HORNE
SENATOR WARREN S. HENDERSON
REPRESENTATIVE GEORGE FIRESTONE
REPRESENTATIVE DON H. REED

ERNEST E. MEANS
DIRECTOR
25 HOLLAND BUILDING
TALLAHASSEE, FLORIDA 32304
TELEPHONE (904) 222-0078

COPY
reproduced by
FLORIDA STATE ARCHIVES
DEPARTMENT OF STATE
R. A. GRAY BUILDING
Tallahassee, FL 32399-0250
Series 19 Carton 197

Mr. Henry M. Kittleson
Holland and Knight
P. O. Drawer B W
Lakeland, Florida 33802

Dear Henry:

I agree with your observation that the remarriage amendment to §768.21 of the Wrongful Death Act is not only wrongly designated as paragraph (c), but also lacks meaning in the context of subsection (6). I remain open to constructive suggestion, but my present thought is that this can only be corrected by legislative act. Let me trace the history for you.

The amendment, in slightly different language, was first proposed by Senator McClain when H.B. 120 was before the Senate Judiciary Civil "A" committee during the 1971 session. That proposal was to insert similar language at line 24 of page 4, which would put it at the end of subsection (2), providing for recovery by the surviving spouse for loss of decedent's companionship and protection, etc. Unfortunately, H.B. 120 died on the Senate calendar and the amendment was never adopted.

Although the 1971 bill history is instructive in telling us where the amendment should have been inserted, I doubt that it would justify our moving the provision editorially. My reluctance is reinforced by the circumstance that the provision is specifically designated as paragraph (c). This designation is not, of course, binding on us. However, it does indicate pretty clearly the legislative intent, however misguided, to insert the amendment at that particular place.

Sincerely,

Ernie

Ernest E. Means, Director
Division of Statutory Revision

EEM:mop

cc Messrs. Trawick, Grissett, D'Alemberte and Hopping

COPY
reproduced by
FLORIDA STATE ARCHIVES
DEPARTMENT OF STATE
R. A. GRAY BUILDING
Tallahassee, Florida 32301

Journal of the SENATE State of Florida

FOURTH REGULAR SESSION

UNDER THE CONSTITUTION AS REVISED IN 1968

FEBRUARY 1 THROUGH APRIL 7, 1972

—was read the second time in full. On motion by Senator Horne, SR 1137 was adopted. The vote was:

Yeas—46

Mr. President	de la Parte	Karl	Saunders
Arnold	Ducker	Knopke	Sayler
Barron	Fincher	Lane	Scarborough
Barrow	Gong	Lewis (33rd)	Stolzenburg
Beaufort	Graham	Lewis (43rd)	Trask
Bell	Gunter	McClain	Ware
Bishop	Haverfield	Myers	Weber
Boyd	Henderson	Ott	Weissenborn
Brantley	Hollahan	Plante	Williams
Childers	Horne	Pope	Wilson
Daniel	Johnson (29th)	Poston	
Deeb	Johnson (34th)	Reuter	

Nays—None

Co-Introducers

By permission Senators Arnold, Barron, Barrow, Beaufort, Bell, Bishop, Boyd, Brantley, Broxson, Childers, Daniel, Deeb, de la Parte, Ducker, Fincher, Gong, Graham, Gunter, Haverfield, Henderson, Hollahan, Horne, Johnson (29th), Johnson (34th), Karl, Knopke, Lane, Lewis (33rd), Lewis (43rd), McClain, Myers, Ott, Plante, Pope, Poston, Reuter, Saunders, Sayler, Scarborough, Stolzenburg, Trask, Ware, Weber, Weissenborn, Williams and Wilson were recorded as co-introducers of SR 1137.

The President introduced the family of Allen Morris to the members of the Senate and requested former recipients of Allen Morris awards to escort Mr. Morris to the rostrum. Senators Barron, Karl, de la Parte, Barrow, Pope, Horne and Hollahan accompanied Mr. Morris to the rostrum where the President presented to him on behalf of the Senate, a copy of SR 1137.

The Select Committee on Executive Suspensions was excused to resume its hearing.

The Senate resumed—

HOUSE BILLS ON SECOND READING

Consideration of HB 1823 was deferred.

HB 3271—A bill to be entitled An act relating to elections; changes in precinct boundaries; amending §98.031(1), Florida Statutes, to authorize the alteration of precincts by boards of county commissioners whenever necessary; providing an effective date.

—was read the second time by title. On motion by Senator Horne, by two-thirds vote HB 3271 was read the third time by title, passed and certified to the House. The vote was:

Yeas—33

Mr. President	Deeb	Knopke	Stolzenburg
Arnold	Ducker	Lane	Trask
Barron	Gong	Lewis (33rd)	Ware
Beaufort	Graham	McClain	Weissenborn
Bell	Haverfield	Pope	Williams
Bishop	Henderson	Poston	Wilson
Boyd	Hollahan	Saunders	
Brantley	Horne	Sayler	
Childers	Johnson (34th)	Scarborough	

Nays—None

By unanimous consent Senators Myers, Daniel and Johnson (29th) were recorded as voting yea.

HB 104—A bill to be entitled An act relating to regulation of boats; amending Section 371.021 (1), Florida Statutes to include barges as vessels; amending Section 371.503, Florida Statutes, relating to interference with navigation to include anchored vessels as navigational hazards; amending Section 371.67, Florida Statutes, relating to enforcement to authorize all authorized enforcement officers to order removal of vessels; providing an effective date.

—was read the second time by title.

The Committee on Transportation offered the following amendment which was moved by Senator Poston and failed:

Amendment 1—On page 2, line 9, strike "or adjacent to"

On motion by Senator Ware, by two-thirds vote HB 104 was read the third time by title, passed and certified to the House. The vote was:

Yeas—28

Mr. President	Gong	Knopke	Scarborough
Bell	Graham	Lane	Stolzenburg
Bishop	Haverfield	Lewis (33rd)	Trask
Brantley	Henderson	Pope	Ware
Daniel	Hollahan	Poston	Weissenborn
Deeb	Horne	Saunders	Williams
Ducker	Johnson (34th)	Sayler	Wilson

Nays—3

Arnold	Barron	Childers

By unanimous consent Senators McClain, Johnson (29th), Boyd and Myers were recorded as voting yea.

HB 120—A bill to be entitled An act relating to wrongful death action; amending chapter 768, Florida Statutes, by adding sections 768.16, 768.17, 768.18, 768.19, 768.20, 768.21, 768.22, 768.23, 768.24, 768.25, 768.26, and 768.27; providing for a right of action on behalf of the survivors and the estate by the personal representative of a decedent whose death is cause by the wrongful act, negligence, default, or breach of contract or warranty of any person; repealing sections 768.01, 768.02, and 768.03, Florida Statutes; providing an effective date.

—was read the second time by title.

The Committee on Judiciary—Civil A offered the following amendment which was moved by Senator Barron:

On page 2, line 2 insert the following: It is also the legislative intent that when a personal injury to the decedent results in his death, no action for the personal injury shall survive.

On motion by Senator Barrow, further consideration of HB 120 with pending amendment was deferred.

HB 2446—A bill to be entitled An act relating to salt water fisheries; amending §370.16(16)(d) and (f), Florida Statutes; providing that oysters less than the prescribed legal size may be placed on the culling board of a vessel; reducing the allowable percentage of small oysters includable in an oyster cargo or lot from twenty-five percent (25%) to fifteen percent (15%); adding paragraph (g) to §370.16(16), Florida Statutes; prohibiting the sale of oysters less than the prescribed legal size; providing an effective date.

—was read the second time by title.

The Committee on Natural Resources and Conservation offered the following amendment which was adopted on motion by Senator Knopke:

Amendment 1—In Section 1, line 2, page 2, after "oysters." (end of sentence) add the following: Oysters shall only be bagged or placed in containers at the establishment of a wholesale dealer in the county of the oysters' origin, provided, however, that when a county line divides a body of water, the oysters may be transported for bagging to the establishment of a wholesale dealer in any of the counties.

The Committee on Natural Resources and Conservation offered the following amendment which was adopted on motion by Senator Knopke:

Amendment 2—In Section 1, line 19, page 2, strike: "up the" and the rest of the paragraph which includes all of lines 20, 21 and 22 and add: to determine the percentage of undersized oysters, one sample bushel to be taken at random from the cargo of oysters and if a total of undersized oysters

Amendment 2—On page 2, immediately following line 29 insert the following: Any supplemental agreement shall not exceed ten per cent (10%) of the original contract amount without prior approval of the majority of the cabinet.

The Committee on Transportation offered the following amendment which was adopted on motion by Senator Poston:

Amendment 3—On page 3, line 3 strike "structures" and insert: facilities

On motion by Senator Wilson the following amendment was adopted:

Amendment 4—On page 3, line 10, strike "upon becoming a law" and insert: July 1, 1972

On motion by Senator Poston, by two-thirds vote SB 330 as amended was read the third time by title, passed and ordered engrossed. The vote was:

Yeas—33

Mr. President	Childers	Lewis (33rd)	Sayler
Arnold	Daniel	Lewis (43rd)	Scarborough
Barron	Ducker	McClain	Stolzenburg
Barrow	Graham	Myers	Trask
Beaufort	Haverfield	Plante	Ware
Bell	Hollahan	Pope	Wilson
Bishop	Horne	Poston	
Brantley	Knopke	Reuter	
Broxson	Lane	Saunders	

Nays—None

By unanimous consent Senators Weissenborn, Gunter, Williams, Johnson (34th) and Johnson (29th) were recorded as voting yea.

HB 120—A bill to be entitled An act relating to wrongful death action; amending chapter 768, Florida Statutes, by adding sections 768.16, 768.17, 768.18, 768.19, 768.20, 768.21, 768.22, 768.23, 768.24, 768.25, 768.26, and 768.27; providing for a right of action on behalf of the survivors and the estate by the personal representative of a decedent whose death is caused by the wrongful act, negligence, default, or breach of contract or warranty of any person; repealing sections 768.01, 768.02, and 768.03, Florida Statutes; providing an effective date.

—was taken up with pending amendment which failed.

The Committee on Judiciary—Civil A offered the following amendment which was adopted on motion by Senator Barron:

Amendment 2—On page 5, line 19 insert: (c) Evidence of remarriage of the decedent's surviving spouse is admissible.

On motion by Senator McClain, by two-thirds vote HB 120 as amended was read the third time by title, passed and certified to the House. The vote was:

Yeas—38

Mr. President	Childers	Johnson (34th)	Reuter
Arnold	Daniel	Knopke	Saunders
Barron	Ducker	Lane	Sayler
Barrow	Graham	Lewis (33rd)	Scarborough
Beaufort	Gunter	Lewis (43rd)	Stolzenburg
Bell	Haverfield	McClain	Trask
Bishop	Henderson	Myers	Ware
Boyd	Hollahan	Ott	Wilson
Brantley	Horne	Plante	
Broxson	Johnson (29th)	Poston	

Nays—2

Pope	Williams

By unanimous consent Senator Weissenborn was recorded as voting yea.

Consideration of CS for HB 3020 was deferred.

SPECIAL ORDER

On motion by Senator Henderson, the rules were waived and consideration of SB 432 was deferred, the bill retaining its place as a special and continuing order of business.

THIRD READING

Consideration of SB 461 was deferred.

SB 300—A bill to be entitled An Act relating to certification of speech pathologists and audiologists; amending section 468.145, Florida Statutes, by adding subsection 468.145(4); providing for the department of education to waive examination and educational requirements for applicants who are certified to teach speech pathology and audiology and were so certified on July 9, 1969; providing an effective date.

—was taken up pending roll call.

On motion by Senator Trask the following amendment was adopted by two-thirds vote:

Amendment 3—On page 1, line 26, strike the period and insert: in the State of Florida.

On motion by Senator Lewis (43rd) the following amendment was adopted:

Amendment 4—On page 1, line 9 in title and line 22, strike "examination and"

On motion by Senator Lewis (43rd), SB 300 as amended was read by title, passed and ordered engrossed. The vote was:

Yeas—30

Arnold	de la Parte	Knopke	Poston
Beaufort	Ducker	Lewis (33rd)	Reuter
Bell	Graham	Lewis (43rd)	Scarborough
Bishop	Gunter	McClain	Stolzenburg
Brantley	Haverfield	Myers	Trask
Childers	Henderson	Ott	Ware
Daniel	Horne	Plante	
Deeb	Johnson (34th)	Pope	

Nays—6

Barron	Hollahan	Sayler	Wilson
Broxson	Lane		

By unanimous consent Senators Johnson (29th) and Weissenborn were recorded as voting yea.

On motion by Senator Hollahan, SB 461 was removed from the calendar and re-referred to an appropriate committee.

The bill was recommitted to the Committee on Judiciary—Criminal.

SECOND READING

Pre-emptive Order

SB 176—A bill to be entitled An act relating to bulkhead lines in certain counties, repealing subsection 253.135 (3), Florida Statutes to delete exception provided therein.

—was read the second time by title.

Senator Scarborough presiding.

The President presiding.

Senator Lane moved that further consideration of SB 176 be deferred.

19/197
Wrongful

SB 323

By Senator de la Parte

Prefiled March 1, 1971

A bill to be entitled

AN ACT relating to wrongful death action; creating §§768.16, 768.17, 768.18 768.19, 768.20, 768.21, 768.22, 768.23, 768.24, 768.25, 768.26, and 768.27, Florida Statutes; providing for a right of action on behalf of the survivors and the estate by the personal representative of a decedent whose death is caused by the wrongful act, negligence, default, or breach of contract or warranty of any person; repealing §§768.01, 768.02, 768.03 and 768.04, Florida Statutes, which provide for a right of action for wrongful death and procedures relating thereto; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Sections 768.16, 768.17, 768.18, 768.19, 768.20, 768.21, 768.22, 768.23, 768.24, 768.25, 768.26, and 768.27, Florida Statutes, are created to read:

768.16 Short title.—Sections 768.16 through 768.27 may be cited as the "Florida wrongful death act."

768.17 Legislative intent.—It is the public policy of the state to shift the losses resulting when wrongful death occurs from the survivors of the

decedent to the wrongdoer. Sections 768.16 through 768.27 are remedial and shall be liberally construed.

768.18 Definitions.—As used in sections 768.16 through 768.27:

(1) "Survivors" means the decedent's spouse, minor children, parents, and, when partly or wholly dependent on the decedent for support or services, any blood relatives and adoptive brothers and sisters. It includes the illegitimate child of a mother, but not the illegitimate child of the father unless the father has recognized a responsibility for the child's support.

(2) "Minor children" means unmarried children under twenty-one (21) years of age.

(3) "Support" includes contributions in kind as well as money.

(4) "Services" means tasks, usually of a household nature, regularly performed by the decedent that will be a necessary expense to the survivors of the decedent. These services may vary according to the identity of the decedent and survivor and shall be determined under the particular facts of each case.

(5) "Net accumulations" means the part of the decedent's expected net business or salary income, including pension benefits, that the decedent probably would have retained as savings and left as part of his estate if he had lived his normal life expectancy. Net business or salary income is the part of the decedent's probable gross income after taxes, excluding income from investments continuing beyond death, that remains after deducting the decedent's personal expenses and support of survivors excluding contributions in kind.

768.19 Right of action.—When the death of a person is caused by the wrongful act, negligence, default, or breach of contract or warranty of any person, including those occurring on navigable waters, and the event would have entitled the person injured to maintain an action and recover damages if death had not ensued, the person or watercraft that would have been liable in damages if death had not ensued shall be liable for damages as specified in this act notwithstanding the death of the person injured, although death was caused under circumstances constituting a felony.

768.20 Parties.—The action shall be brought by the decedent's personal representative, who shall recover for the benefit of the decedent's survivors and estate all damages, as specified in this act, caused by the injury resulting in death. When a personal injury to the decedent results in his death, no action for the personal injury shall survive, and any such action pending at the time of death shall abate. The wrongdoer's personal representative shall be the defendant if the wrongdoer dies before or pending the action. A defense that would bar or reduce a survivor's recovery if he were the plaintiff may be asserted against him, but shall not affect

the recovery of any other survivor.

768.21 Damages.—All potential beneficiaries of a recovery for wrongful death, including the decedent's estate, shall be identified in the complaint and their relationships to the decedent shall be alleged. Damages may be awarded as follows:

(1) Each survivor may recover the value of lost support and services from the date of the decedent's injury to his death, with interest, and future loss of support and services from the date of death and reduced to present value. In evaluating loss of support and services, the survivor's relationship to the decedent, the amount of the decedent's probable net income available for distribution to the particular survivor, and the replacement value of the decedent's services to the survivor may be considered. In computing the duration of future losses, the joint life expectancies of the survivor and the decedent and the period of minority in the case of healthy minor children may be considered.

(2) The surviving spouse may also recover for loss of the decedent's companionship and protection and for mental pain and suffering from the date of injury.

(3) Minor children of the decedent may also recover for lost parental companionship, instruction, and guidance and for mental pain and suffering from the date of injury.

(4) Each parent of a deceased minor child may

also recover for mental pain and suffering from the date of injury.

(5) Medical or funeral expenses due to the decedent's injury or death may be recovered by a survivor who has paid them.

(6) The decedent's personal representative may recover for the decedent's estate the following:

(a) Loss of earnings of the deceased from the date of injury to the date of death, less lost support of survivors excluding contributions in kind, with interest. If the decedent's survivors include a surviving spouse or lineal descendants, loss of net accumulations beyond death and reduced to present value may also be recovered.

(b) Medical or funeral expenses due to the decedent's injury or death that have become a charge against his estate or that were paid by or on behalf of decedent, excluding amounts recoverable under subsection (5).

(7) All awards for the decedent's estate are subject to the claims of creditors who have complied with the requirements of probate law concerning claims.

768.22 Form of verdict.—The amounts awarded to each survivor and to the estate shall be stated separately in the verdict.

768.23 Protection of minors and incompetents.—The court may put in trust or provide other protection for any amount awarded for the benefit of a minor child or an incompetent.

768.24 Death of a survivor before judgment.—A survivor's death before final judgment shall limit the survivor's recovery to lost support and services to the date of his death. The personal representative shall pay the amount recovered to the personal representative of the deceased survivor.

768.25 Court approval of settlements.—While an action under this act is pending, no settlement as to amount or apportionment among the beneficiaries which is objected to by any survivor or which affects a survivor who is a minor or an incompetent shall be effective unless approved by the court.

768.26 Litigation expenses.—Attorneys' fees and other expenses of litigation shall be paid by the personal representative and deducted from the awards to the survivors and the estate in proportion to the amount awarded to them, but expenses incurred for the benefit of a particular survivor or the estate shall be paid from their awards.

768.27 Effective date.—Sections 768.16 through 768.27 shall take effect on January 1, 1972, and shall not apply to deaths occurring before that date.

Section 2. Sections 768.01, 768.02, 768.03, and 768.04, Florida Statutes, are repealed when this act takes effect.

LEGISLATIVE SERVICE BUREAU SUMMARY

Amends Chapter 768, F. S., by adding Sections 768.16 through 768.27, F. S., to be cited as "Florida Wrongful Death Act." Provides that when death of a person is caused by wrongful act, including those on navigable waters, and which would have entitled person to recover damages if death had not occurred, person or watercraft shall be liable for damages. Provides action shall be brought by decedent's personal representative with recovery for benefit of survivors and decedent's estate. Actions for personal injuries of decedent shall abate. Damages may be awarded for loss of support and services to each survivor; to spouse for loss of companionship, protection, and for mental pain and suffering; to minor children for loss of companionship, instruction, guidance and for mental pain and suffering; to parents for mental pain and suffering. Provides certain limitations, protection by court of minors and incompetents, court approval of settlements where survivor objects, and attorneys' fees paid out of award. Repeals Sections 768.01, 768.02, 768.03 and 768.04, F. S., the present basis of wrongful death actions. Effective January 1, 1972.

Similar to House Bill No. 120.

Similar to 1970 Committee Substitute for House Bill No. 1242.

By Representative D'Alemberte

A bill to be entitled

AN ACT relating to wrongful death action; amending chapter 768, Florida Statutes, by adding sections 768.16, 768.17, 768.18, 768.19, 768.20, 768.21, 768.22, 768.23, 768.24, 768.25, 768.26, and 768.27; providing for a right of action on behalf of the survivors and the estate by the personal representative of a decedent whose death is caused by the wrongful act, negligence, default, or breach of contract or warranty of any person; repealing sections 768.01, 768.02, and 768.03, Florida Statutes; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Chapter 768, Florida Statutes, is amended by adding sections 768.16, 768.17, 768.18, 768.19, 768.20, 768.21, 768.22, 768.23, 768.24, 768.25, 768.26, and 768.27 to read:

768.16 Short title.—Sections 768.16 through 768.27 may be cited as the "Florida wrongful death act."

768.17 Legislative intent.—It is the public policy of the state to shift the losses resulting when wrongful death occurs from the survivors of the

decedent to the wrongdoer. Sections 768.16 through 768.27 are remedial and shall be liberally construed.

768.18 Definitions.--As used in sections 768.16 through 768.27:

(1) "Survivors" means the decedent's spouse, minor children, parents, and, when partly or wholly dependent on the decedent for support or services, any blood relatives and adoptive brothers and sisters. It includes the illegitimate child of a mother, but not the illegitimate child of the father unless the father has recognized a responsibility for the child's support.

(2) "Minor children" means unmarried children under twenty-one (21) years of age.

(3) "Support" includes contributions in kind as well as money.

(4) "Services" means tasks, usually of a household nature, regularly performed by the decedent that will be a necessary expense to the survivors of the decedent. These services may vary according to the identity of the decedent and survivor and shall be determined under the particular facts of each case.

(5) "Net accumulations" means the part of the decedent's expected net business or salary income, including pension benefits, that the decedent probably would have retained as savings and left as part of his estate if he had lived his normal life expectancy. Net business or salary income is the part of the decedent's probable gross income after taxes,

excluding income from investments continuing beyond death, that remains after deducting the decedent's personal expenses and support of survivors excluding contributions in kind.

768.19 Right of action.--When the death of a person is caused by the wrongful act, negligence, default, or breach of contract or warranty of any person, including those occurring on navigable waters, and the event would have entitled the person injured to maintain an action and recover damages if death had not ensued, the person or watercraft that would have been liable in damages if death had not ensued shall be liable for damages as specified in this act notwithstanding the death of the person injured, although death was caused under circumstances constituting a felony.

768.20 Parties.--The action shall be brought by the decedent's personal representative, who shall recover for the benefit of the decedent's survivors and estate all damages, as specified in this act, caused by the injury resulting in death. When a personal injury to the decedent results in his death, no action for the personal injury shall survive, and any such action pending at the time of death shall abate. The wrongdoer's personal representative shall be the defendant if the wrongdoer dies before or pending the action. A defense that would bar or reduce a survivor's recovery if he were the plaintiff may be asserted against him, but shall not affect

the recovery of any other survivor.

768.21 Damages.—All potential beneficiaries of a recovery for wrongful death, including the decedent's estate, shall be identified in the complaint and their relationships to the decedent shall be alleged. Damages may be awarded as follows:

(1) Each survivor may recover the value of lost support and services from the date of the decedent's injury to his death, with interest, and future loss of support and services from the date of death and reduced to present value. In evaluating loss of support and services, the survivor's relationship to the decedent, the amount of the decedent's probable net income available for distribution to the particular survivor, and the replacement value of the decedent's services to the survivor may be considered. In computing the duration of future losses, the joint life expectancies of the survivor and the decedent and the period of minority in the case of healthy minor children may be considered.

(2) The surviving spouse may also recover for loss of the decedent's companionship and protection and for mental pain and suffering from the date of injury.

(3) Minor children of the decedent may also recover for lost parental companionship, instruction, and guidance and for mental pain and suffering from the date of injury.

(4) Each parent of a deceased minor child may

also recover for mental pain and suffering from the date of injury.

(5) Medical or funeral expenses due to the decedent's injury or death may be recovered by a survivor who has paid them.

(6) The decedent's personal representative may recover for the decedent's estate the following:

(a) Loss of earnings of the deceased from the date of injury to the date of death, less lost support of survivors excluding contributions in kind, with interest. If the decedent's survivors include a surviving spouse or lineal descendants, loss of net accumulations beyond death and reduced to present value may also be recovered.

(b) Medical or funeral expenses due to the decedent's injury or death that have become a charge against his estate or that were paid by or on behalf of decedent, excluding amounts recoverable under subsection (5).

(7) All awards for the decedent's estate are subject to the claims of creditors who have complied with the requirements of probate law concerning claims.

768.22 Form of verdict.—The amounts awarded to each survivor and to the estate shall be stated separately in the verdict.

768.23 Protection of minors and incompetents.—The court may put in trust or provide other protection for any amount awarded for the benefit of a minor child or an incompetent.

768.24 Death of a survivor before judgement.—A survivor's death before final judgment shall limit the survivor's recovery to lost support and services to the date of his death. The personal representative shall pay the amount recovered to the personal representative of the deceased survivor.

768.25 Court approval of settlements.—While an action under this act is pending, no settlement as to amount or apportionment among the beneficiaries which is objected to by any survivor or which affects a survivor who is a minor or an incompetent shall be effective unless approved by the court.

768.26 Litigation expenses.—Attorneys' fees and other expenses of litigation shall be paid by the personal representative and deducted from the awards to the survivors and the estate in proportion to the amount awarded to them, but expenses incurred for the benefit of a particular survivor or the estate shall be paid from their awards.

768.27 Effective date.—Sections 768.16 through 768.27 shall take effect on January 1, 1972, and shall not apply to deaths occurring before that date.

Section 2. Sections 768.01, 768.02, and 768.03, Florida Statutes, are repealed when this Act takes effect.

LEGISLATIVE SERVICE BUREAU SUMMARY

Amends Chapter 768, F. S., by adding Sections 768.16 through 768.27, F. S., to be cited as "Florida Wrongful Death Act." Provides that when death of a person is caused by wrongful act, including those on navigable waters, and which would have entitled person to recover damages if death had not occurred, person or watercraft shall be liable for damages. Provides action shall be brought by decedent's personal representative, with recovery for benefit of survivors and decedent's estate. Actions for personal injuries of decedent shall abate. Damages may be awarded for loss of support and services to each survivor; to spouse for loss of companionship, protection, and for mental pain and suffering; to minor children for loss of companionship, instruction, guidance and for mental pain and suffering; to parents for mental pain and suffering. Provides certain limitations, protection by court of minors and incompetents, court approval of settlements where survivor objects, and attorneys' fees paid out of award. Repeals Section 768.01, 768.02 and 768.03, F. S., the present basis of wrongful death actions. Effective date: January 1, 1972.

Similar to 1970 Committee Substitute for House Bill No. 1242.

COPY
reproduced by
FLORIDA STATE ARCHIVES
DEPARTMENT OF STATE
R. A. GRAY BUILDING
Tallahassee, FL 32399-0250
Series 1052 Carton 15

REPORT

to the

FLORIDA LAW REVISION COMMISSION

by L. S. Powers

April 22, 1971

The Executive Director of the Florida Law Revision Commission has asked me to report on the present status of the Commission's recommended Wrongful Death Act. My report follows.

The proposed act was introduced in the House of Representatives by Representative D'Alemberte and bears the designation House Bill 120. A hearing was held by the House Judiciary Committee chaired by Representative D'Alemberte on April 7, the second day of the current legislative session. I was called by the Committee's staff and invited to appear, and this was cleared with the Executive Director. At the hearing, I was asked to present the bill and explain it. Numerous questions were asked by the members of the Committee and several suggested changes were discussed, but only one amendment was adopted: Section 768.23 was amended to read as follows:

> The court shall provide protection for any amount awarded for the benefit of a minor child or an incompetent pursuant to the Florida guardianship law.

In my opinion, this amendment is of little importance. I preferred our original language, but there were members of the Committee who thought that some reference to the Florida guardianship law would improve the section. Some lobbyists were present at the hearing, but my recollection is that no one spoke against the proposed act, and the bill was reported out favorably by an unanimous vote of the Committee. I thought Representative D'Alemberte chaired the hearing superbly.

The proposed act was introduced in the Senate by Senator De la Parte and bears the designation Senate Bill 323. A hearing was called by a Senate Judiciary Committee for April 20. We learned of this on April 19 through the good offices of Ernest Means, who called the Executive Director. A call to Representative D'Alemberte's office in Tallahassee resulted in the Senate Committee issuing an invitation to me to be present to testify. Senator Barron, Chairman of the Committee, called on Senator De la Parte to present the bill, which he did. I was invited to explain it. Many critical questions were asked by members of the Committee, and when the public was invited to comment several suggestions for changes were made by a lobbyist for the railroads and the insurance industry. This was followed by a series of proposed amendments by Senator McClain, which had been reduced to writing. My recollection is that there were four proposed amendments that were seriously considered by the Committee.

Two of the amendments were adopted. I do not have the exact language, because I was permitted to participate in the discussion of them and was too busy to write them down. I can state the substance of them, however. (Let me respectfully suggest that you lay your copy of the Commission's Report in front of you). One of them is an amendment to section 768.21(1) in lines 2, 3, 4, and 5 on page 11 of our Report. The effect of this amendment is to make the provision in question mandatory rather than permissive. The amendment rewrites the sentence in question, but substantially the same effect can be achieved if you will substitute "must" for "may" in line 4 on page 11. In my opinion, this does little or no damage.

The other amendment that was adopted is in section 768.21(2). The substance of this amendment is that a sentence is added providing that the fact of remarriage may be introduced into evidence. My research on that point indicates that the majority rule is distinctly to the contrary and that only one state (Wisconsin) permits remarriage to be considered in arriving at damages for a surviving spouse. The traditional view has been that all rights are fixed as of the date of the death, and it is possible that admitting some later development like remarriage to be introduced might make other subsequent developments relevant and admissible also. For example, I called the Committee's attention to the fact that the addition of this language to the bill

might very well mean that a plaintiff would be entitled to introduce into evidence that the remarriage was an unhappy marriage and that the widow was supporting her new husband rather than the reverse, etc. The Committee debated this proposed amendment with great vigor, and it was adopted by a split vote. In my opinion, this is a highly controversial change, and I am sure that there are individuals and groups that will oppose it vigorously. I suggested the wisdom of introducing it as a separate bill, because it might endanger the passage of the whole package, which is very badly needed reform legislation. On the other hand, this amendment does not affect the bill to the point that the Commission's proposed reform package is itself damaged.

Another proposed amendment would have eliminated any recovery for mental pain and suffering by anyone whether spouse, minor children, or parents as provided for in section 768.21. This proposed amendment was defeated. Another proposed amendment would have amended section 768.19, the basic Lord Campbell's provision. It would have inserted the words "in Florida" after the word "person" in line 12 on page 10 of the Report. It would have also added a sentence at the end, which, to the best of my recollection, provided that in case of the death of a citizen or resident of Florida, an action would lie under the Florida Wrongful Death Act even though the injury and death occurred outside of Florida.

As you know, the present Wrongful Death Act of Florida requires that the death occur in Florida in order for the act to apply. The Commission eliminated that requirement in its proposal, because it would obviously cause a great deal of difficulty where the injury occurred in Florida but the death occurred elsewhere. For example, the Wrongful Death Act of the District of Columbia requires that "an injury done or happening" must occur within the District of Columbia in order for that Wrongful Death Act to apply. If someone were injured in Florida and went to Washington, D. C. and there died from it, a strict construction of the two wrongful death acts would indicate that neither one would be available for a wrongful death action. In this connection, it is well to recall the strict construction often given to wrongful death legislation because it is in derogation of the common law. The lobbyist expressed concern over our having eliminated the requirement that the death occur in the State. His concern arose on behalf of his railroad clients because of the possibility of forum shopping by plaintiffs' attorneys. The proposed amendment was supported as guarding against this danger. I opposed the proposed amendment because of the tremendous uncertainty of the insertion of the words "in Florida." If the death was caused by a wrongful act or negligence it would not be difficult to determine whether it happened in Florida or not, but when does a breach of contract

or warranty occur in Florida? Also, the sentence about residents or citizens of Florida being able to sue here though the harm occurred elsewhere seemed to be supported in part on the basis that the Florida substantive law on liability would be applicable as well as the Wrongful Death Act itself. I do not believe that a tortious injury and resulting death occurring in another state or country could be the basis for constitutionally requiring the application of Florida's substantive law of torts. In any event, I think both the proposed changes in section 768.19 would create tremendous problems of interpretation. In my opinion, conflict of laws issues such as this are better dealt with by the courts without such inflexible requirements such as this. The proposed amendment was defeated.

There were a couple of technical amendments unanimously adopted in the beginning which simply corrected technical errors appearing in the Senate version of the proposed act.

The Committee gave the bill as amended a favorable report, and my recollection is that it was by an unanimous vote. Obviously, the Senate Bill and House Bill now differ, and there is also the possibility of further amendment in both houses. If the two bills are enacted, it is almost certain that a conference committee will have to resolve the differences. Representative D'Alemberte indicated on April 20 that he is seeking early action on the House Bill, and it may be on the floor of the House this week.

I thought Senator Barron, the Chairman of the Senate Committee, presided very ably and fairly at the Senate hearing. Senator De la Parte, who is not a member of the Senate Committee, defended the Commission's bill very ably and energetically, speaking as the senator who introduced it. At several points in the hearing, he most eloquently supported the Commission's proposal on the basis that the integrity of the package should not be damaged in any serious way. I am sure his vigorous opposition to further amendments was very helpful in the defeat of some of the proposed changes. I did not realize that he was as interested in this proposed legislation nor in the Florida Law Revision Commission as he obviously is. I was very grateful for his presence. Also, I would like to acknowledge the help of Ernest Means and a member of Representative D'Alemberte's staff, Miss Janet Reno, both of whom assisted me in various ways at the hearing.

I hope this report will be helpful. If you have any questions, do not hesitate to call or write me. I am very optimistic about the enactment of the proposed act. Let me say, however, that there is a lot more pleasure involved in drafting legislation than there is in defending it at hearings of legislative committees.

Respectfully submitted,

L. S. Powers
Reporter

LSP/mc

CHAPTER 3439—[No. 27.]

AN ACT Fixing the Liability of Persons and Corporations for Damages Resulting from the Death of any one Caused by the Wrongful act, Negligence, Carelessness or Default of such Persons or Corporations, or the Agents thereof.

Action for damages when death of a person shall be caused by wrongful act, negligence, &c., given in cases where action would lie if death had not ensued.

The People of the State of Florida, represented in Senate and Assembly, do enact as follows: SECTION 1. Whenever the death of any person in this State shall be caused by the wrongful act, negligence, carelessness or default of any individual or individuals, or by the wrongful act, negligence, carelessness or default of any corporation, or by the wrongful act, negligence, carelessness or default of any agent of any corporation when acting in his capacity of agent of such corporation, and the act, negligence, carelessness or default is such as would, if death had not ensued, have entitled the party injured thereby to maintain an action for damages in respect thereof, then and in every such case the person or persons who, or corporation which, would have been liable in damages if death had not ensued, shall be liable to an action for damages notwithstanding the death shall have been caused under such circumstances as make it in law amount to a felony.

By whom action may be brought.

SEC. 2. Every such action shall be brought by and in the name of the widow or husband, as the case may be, and where there is neither a widow or husband surviving the deceased, then the minor child or children may maintain an action: and where there is neither a widow or husband, or minor child or children, then the action may be maintained by any person or persons dependent on such person killed for a support; and where there is neither of the above class of persons to sue, then the action may be maintained by the executor or administrator, as the case may be, of the person so killed; and in every such action the jury shall give such damages as the party or parties entitled to sue may have sustained by reason of the death of the party killed: *Provided*, That any action instituted under this act, by or in behalf of a person or persons under twenty-one years of age, shall be brought by and in the name of a next friend.

Damages.

Infants.

Limitation.

SEC. 3. That no action provided for by this act shall be brought after the expiration of two years from the date of the death of the party from whose death such action shall accrue.

Repeal.

SEC. 4. That all laws and parts of laws in conflict with the provisions of this act be and the same are hereby repealed.

Approved February 28, 1883.

REGULAR SESSION, 1915

GENERAL

ACTS AND RESOLUTIONS

ADOPTED BY THE

LEGISLATURE of FLORIDA

At Its Fifteenth Regular Session,
(April 6 to June 4, 1915),
Under the Constitution of A. D. 1885

Together With an Appendix Containing a Statement of Receipts and Expenditures for 1913-1914 as Required by the Constitution.

PUBLISHED BY AUTHORITY OF LAW UNDER DIRECTION OF THE ATTORNEY GENERAL

VOL I

1915

T. J. APPLEYARD, STATE PRINTER,
TALLAHASSEE, FLORIDA.

Sec. 8. This Act shall take effect immediately upon its approval by the Governor, or upon becoming a law without such approval.

Approved June 4, 1915.

CHAPTER 6912—(No. 106).

AN ACT to Provide for the Salaries and Compensation of the Justices of the Supreme Court, Circuit Judges, Judges of the Criminal Courts of Record and Judge of the Court of Record in and for Escambia County, in the State of Florida.

Be It Enacted by the Legislature of the State of Florida:

Salaries of Supreme Court Justices and Circuit Judges.

Section 1. That after this Act takes effect, the salaries of the Justices of the Supreme Court of Florida shall be the sum of forty-five hundred ($4,500.00) dollars each per annum, the salaries of the Circuit Judges shall be the sum of forty-three hundred dollars ($4,300,00) per annum, and warrants shall be drawn by the Comptroller in accordance herewith.

Salaries of Judges of Criminal Courts of Record.

Sec. 2. That the salaries of the Judges of the Criminal Courts of Record in counties having a population of fifteen thousand or less shall be one thousand ($1,000.00) dollars per annum; in counties of less than twenty-five thousand population and over fifteen thousand population, the salaries shall be fifteen hundred ($1,500.00) dollars per annum; in counties having a population of more than twenty-five thousand and less than sixty thousand, the salaries shall be one thousand eight hundred dollars ($1,800.00) per annum, and in all counties having a population of over sixty thousand, the salaries shall be two thousand five hundred dollars ($2,500.00) per annum.

Court of Record of Escambia County.

Sec. 3. That the salary of the Judge of the Court of Record in and for Escambia County shall be the sum of three thousand five hundred dollars ($3,500.00) per annum, which said Judge shall not engage in the practice of law during his term of office, nor in anywise exercise the profession or accept compensation as an attorney or counselor.

Salary constitutes entire compensation.

Sec. 4. The salaries provided for in this Act shall constitute the entire compensation, and allowances of any and every nature, and shall be paid as now provided by law, except that each Circuit Judge when traveling on official business beyond the Circuit for which he was appointed, shal lbe, and is hereby given an allowance to the amount of his actual expenses for transportation, board and lodging, and such amount forthwith after said official trip shall terminate to be set forth in an itemized certificate by the Circuit Judge to the Comptroller.

Sec. 5. All laws and parts of laws in conflict with the provisions of this Act shall be, and the same are, hereby repealed.

Sec. 6. This Act shall take effect from the time it becomes a law.

Approved May 29, 1915.

CHAPTER 6913—(No. 107).

to Amend Section 3145, General Statutes of the State of Florida, Relating to Claims for Death Caused by Negligence.

Be It Enacted by the Legislature of the State of Florida:

Section 1. That Section 3145, General Statutes of the State of Florida be and the same is hereby amended so as to read as follows:

Claim death caus by negligence.

Whenever the death of any person in this State shall be caused by the wrongful act, negligence, carelessness or default of any individual or individuals, or by the wrongful act, negligence, carelessness, or default, of any corporation, or by the wrongful act, negligence, carelessness, or default, of any agent of any corporation, acting in his capacity of agent of such corporation (or by the wrong ful act, negligence, carelessness, or default of any ship, vessel or boat or persons employed thereon), and the

act, negligence, carelessness, or default, is such as would, if the death had not ensued, have entitled the party injured thereby to maintain an action (or to proceed in rem against the said ship, vessel or boat, or in personam against the owners thereof, or those having control of her) and to recover damages in respect thereof, then and in every such case the person or persons who, or the corporation (or the ship, vessel or boat), which would have been liable in damages if death had not ensued, shall be liable to an action for damages (or if a ship, vessel or boat to a libel in rem, and her owners or those responsible for her wrongful act, negligence, carelessness, or default, to a libel in personam), notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to a felony.

Sec. 2. This Act shall take effect immediately upon its approval by the Governor.

Approved May 28, 1915.

CHAPTER 6914—(No. 108).

AN ACT Making Any Person, Firm or Corporation Liable, on Demand, in Current Money of the United States, to Any Legal Holder Thereof, for the Full Face Value of Any Checks, Coupons, Punch-outs, Tickets, Tokens or Other Device Issued by Them in Payment for Labor, and Redeemable Either Wholly or Partially in Merchandise at Their or Any Other Place of Business, and Fixing the Time After Which Said Checks, Coupons, Punch-outs, Tickets, Tokens or Other Device Shall Become Redeemable in Cash, and Providing for the Enforcement of This Act.

Be It Enacted by the Legislature of the State of Florida:

When pay checks redeemable in money.

Section 1. That any person, firm or corporation issuing checks, coupons, punch-outs, tickets, tokens or other device in payment for labor, redeemable either

wholly or partially in goods or merchandise, at their or any other place of business, shall, on demand of any legal holder thereof, on or after the ninetieth day succeeding the day of issuance, be liable for the full face value thereof in current money of the United States.

Payable in money to bearer notwithstanding stipulations.

Sec. 2. That any such checks, punch-outs, coupons, tickets, tokens or other device, issued by any person, firm or corporation in payment for labor shall be considered and treated as payable to bearer in current money of the United States, notwithstanding any contrary stipulation or provision which may be therein contained.

Suit to recover after ninetieth day.

Sec. 3. That in case of failure of any person, firm or corporation to pay any legal holder of any such check, punch-out, ticket, coupon, token or other device issued by them in payment for labor, the full face value thereof in current money of the United States, on or after the ninetieth day succeeding the day of issuance, when so demanded, such holder may immediately bring suit thereon in any court of competent jurisdiction, and, in addition to recovering the full face value thereof, with legal interest from demand, may recover ten per cent of said amount as attorney's fees in the same suit.

Sec. 4. All laws and parts of laws in conflict herewith are hereby repealed.

Sec. 5. This Act shall take effect immediately upon its passage and approval by the Governor.

Approved June 5, 1915.

CHAPTER 6915—(No. 109).

AN ACT Relative to the Care, Maintenance and Hiring of State Convicts and Making an Appropriation for Carrying Out the Provisions Thereof.

Be It Enacted by the Legislature of the State of Florida:

State convicts to be graded into three classes.

Section 1. On or before the first day of August, 1915, the State Prison Physicians shall examine and grade all the State convicts and shall divide the said convicts into

REGULAR SESSION 1953

GENERAL ACTS AND RESOLUTIONS

ADOPTED BY THE

LEGISLATURE OF FLORIDA

At its Thirty-fourth Regular Session

April 7th to and Including June 5, 1953

UNDER THE CONSTITUTION OF A. D. 1885

Published by Authority of Law

Volume I

1953

of Commissioners of State Institutions. At the end of each biennium all sums in excess of $250,000.00 in said fund, as determined by the state auditor, shall revert to the general revenue fund.

Section 2. This act shall take effect July 1, 1953.

Became a law without the Governor's approval.

Filed in Office Secretary of State June 15, 1953.

CHAPTER 28280

SENATE BILL NO. 363

AN ACT amending Section 768.01, Florida Statutes, relating to right of action for death due to wrongful act, negligence, carelessness or default based on both contract and tort.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 768.01, Florida Statutes, is amended to read:

768.01 *Right of action for death.—*

(1) Whenever the death of any person in this state shall be caused by the wrongful act, negligence, carelessness or default of any individual or individuals, or by the wrongful act, negligence, carelessness or default of any corporation, or by the wrongful act, negligence, carelessness, or default, of any agent of any corporation, acting in his capacity of agent of such corporation (or by the wrongful act, negligence, carelessness or default of any ship, vessel or boat or persons employed thereon), and the act, negligence, carelessness or default, is such as would, if the death had not ensued, have entitled the party injured thereby to maintain an action (or to proceed in rem against the said ship, vessel or boat, or in personam against the owners thereof, or those having control of her) and to recover damages in respect thereof, then and in every such case the person or persons who, or the corporation (or the ship, vessel or boat), which would have been liable in damages if death had not ensued shall be liable to an action for damages (or if a ship, vessel or boat, to a libel in rem, and her owners or those responsible for her wrongful act, negligence, carelessness or default, to a libel in personam), notwithstanding the death of the person injured, and although the death shall have

been caused under such circumstances as amount in law to a felony.

(2) The right of action as set forth in subsection (1) above shall extend to and include actions ex contractu and ex delicto.

Became a law without the Governor's approval.

Filed in Office Secretary of State June 15, 1953.

CHAPTER 28281

SENATE BILL NO. 359

AN ACT amending Section 40.02(1), Florida Statutes, relating to the number of persons for the selection of jury lists.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 40.02(1), Florida Statutes, is amended to read:

40.02 *Selection of jury lists by county commissioners.—*

(1) SELECTION OF LISTS, GENERALLY.—In all counties, except those having a jury commission, the county commissioners shall hold a meeting during the first week in January of each year, or as soon thereafter as practicable, and at such other times as the circuit judge may order, for the purpose of selecting jury lists. At such meeting said commissioners shall personally select, from the lists of persons who are qualified to serve as jurors under the provisions of §40.01, and make out a list of, not less than two hundred fifty (250) nor more than fifteen hundred (1,500) persons properly qualified to serve as jurors, which list shall be signed and verified by said commissioners as having been personally selected as aforesaid and as possessing the prescribed qualifications according to their best information and belief. Said list shall be forthwith delivered to the clerk of the circuit court and by him recorded in the minute book of the board of county commissioners.

Became a law without the Governor's approval.

Filed in Office Secretary of State June 15, 1953.

COPY
reproduced by
FLORIDA STATE ARCHIVES
DEPARTMENT OF STATE
R. A. GRAY BUILDING
Tallahassee, FL 32399-0250
Series 12 Carton 197

FLORIDA HOUSE OF REPRESENTATIVES

TALLAHASSEE

TALBOT "SANDY" D'ALEMBERTE
REPRESENTATVE, 98TH DISTRICT
ROOM 203, CAPITOL
TALLAHASSEE, FLORIDA 32304

March 8, 1972

COMMITTEES:
JUDICIARY, CHAIRMAN
APPROPRIATIONS
RULES & CALENDAR
FINANCE & TAXATION

J. B. Spence, Esquire
Suite 801, City National Bank Building
Miami, Florida 33130

Dear J.B.:

Thank you for your letter of March 1st. The Wrongful Death Bill passed the legislature with the amendment which you find objectionable. It was our feeling that even with this amendment the bill was much preferable to the existing situation.

Sincerely,

Sandy

Talbot "Sandy" D'Alemberte

TD'A:njd

P.S. We had to make a tough decision on this one. The amendment was not proper because it dealt with a matter better left to the courts. The whole act was in danger and I felt we had to swallow it. I believe that the Academy agreed with me.

LAW OFFICES

SPENCE, PAYNE & MASINGTON, P. A.

SUITE 801-CITY NATIONAL BANK BUILDING

MIAMI, FLORIDA 33130

J B SPENCE
R W PAYNE, JR
RICHARD S MASINGTON

25 WEST FLAGLER STREET
TELEPHONE 377-0641
AREA CODE 305

March 1, 1972

Honorable Talbot D'Alemberte
House of Representatives
Tallahassee, Florida

Dear Sandy:

I am involved in a case which is going to be presented to the Supreme Court shortly, dealing with damages under the Wrongful Death Statute. The question certified to the Supreme Court is whether or not the Defendant may refer to the fact that the Plaintiff has remarried.

I am enclosing for your information a copy of the brief which refuses all of the Florida decisions that deal with the subject. On page five of the brief recites all of the jurisdictions who have ruled on the matter nationwide. Sandy, please note the comments on page seven of this brief. The reason I am bringing this to your attention is that I understand that the Wrongful Death Statute has been amended by the Senate to provide that evidence of remarriage may be introduced to reduce the Plaintiff's damages.

I think such an amendment is a "gutting" tactic, pure and simple and I hope that you will fight against such an amendment to your bill.

I really appreciate all of your help and effort.

Warmest regards,

J. B. Spence

JBS/jąc
Enclosure

IN THE SUPREME COURT OF FLORIDA

NO. 41,472

SEABOARD COAST LINE RAILROAD COMPANY,

Petitioner,

vs.

CAROLYN HILL, as widow of LESTER GEORGE HILL, JR.,

Respondent.

AMICUS CURIAE BRIEF ON BEHALF OF THE ACADEMY OF FLORIDA TRIAL LAWYERS

PODHURST, ORSECK & PARKS, P.A.
Second Floor, Concord Building
66 West Flagler Street
Miami, Florida 33130

ROBERT ORSECK, ESQUIRE

On Behalf Of The Academy Of Florida Trial Lawyers

TABLE OF CONTENTS

		PAGE
I	STATEMENT OF THE CASE AND FACTS	1
II	QUESTION PRESENTED	1
III	ARGUMENT	2
IV	CONCLUSION	13
V	CERTIFICATE OF SERVICE	13

TABLE OF CASES AND AUTHORITIES CITED

	PAGE
Seaboard Coastline Railroad Company v. Hill, Fla. App. 1971, 249 So. 2d 311	1
Town of Miami Springs v. Borrasca, Fla. App. 1959, 110 So. 2d 519, cert. den., 114 So. 2d 4	2
South Florida Hospital Corp. v. McCrea, Fla. 1960, 118 So. 2d 25	3
Perley v. Beaver Drugs, Inc., Fla. 1965, 177 So. 2d 221	3
Newmons v. Lake Worth Drainage District, Fla. 1956, 87 So. 2d 49, 50	3
32 Words and Phrases, Per Curiam	3
Black's Law Dictionary, Minor v. Fike, 77 Kan. 806, 93 P. 264	3
Clarke v. Western Assur. Co., 146 Pa. 561, 23 A. 248, 15 L.R.A. 127	3
F.E.C. v. Keilen, Fla. App. 1966, 183 So. 2d 547	3
Smith v. Whidden, Fla. 1956, 87 So. 2d 42	4
Frazier v. Ewell Engineering & Contracting Co., Fla. 1952, 62 So. 2d 51	4
Wadsworth v. Friend, Fla. App. 1967, 201 So. 2d 641	4
O'Neill v. Ray, Fla. App. 1968, 213 So. 2d 1	4
Paradis v. Thomas, Fla. App. 1963, 150 So. 2d 457	4
Greyhound Corp. v. Ford, Fla. App. 1963, 157 So. 2d 427	4

TABLE OF CASES AND
AUTHORITIES CITED (cont.)

	PAGE
Cases collected from 26 jurisdictions; jurisdictions listed in alphabetical order; 24 forbid proof of remarriage--2 allow it	5-7
Pepper v. Shell, Fla. 1947, 34 So.2d 72, 80	8
Seaboard Railroad Company v. Martin, 56 So.2d 889, 1952	10
Lawyer v. Dr. Pepper Bottling Co., La.App.1959, 117 So.2d 642	12
Johns v. Baltimore & Ohio R. Co., ED. Pa.1956, 143 F.Supp. 15, affirmed 3 Cir.1957, 239 F.2d 385	12

LAW OFFICES, PODHURST, ORSECK & PARAS, P.A — OF COUNSEL, WALTER H. BECKHAM, JR.
66 WEST FLAGLER STREET, MIAMI, FLORIDA 33130

I
STATEMENT OF THE CASE AND FACTS

This certiorari proceeding is before the court on a petition filed pursuant to a certificate of the District Court of Appeal, Fourth District, concluding that its decision in Seaboard Coastline Railroad Company v. Hill, Fla. App. 1971, 250 So. 2d 311, passed upon a question of great public interest. The question certified in the opinion and certificate is:

> "Whether or not in a wrongful death action under Section 768.02, F.S. 1969, brought by one spouse to collect damages resulting from the wrongful death of the other spouse, evidence of plaintiff's remarriage is admissible to mitigate damages."

Briefly summarized, a wrongful death action by the surviving wife of the deceased was brought against the petitioner railroad. A verdict for the plaintiff resulted. During the trial, the court ruled that proof of remarriage of the plaintiff was not admissible to mitigate damages or for any other purpose; and that the defendant could not allude to the fact of remarriage or argue it.

The Fourth District affirmed the judgment for the plaintiff, thoroughly discussing the issue (250 So. 2d 316-318).

The defendant-petitioner now challenges the ruling on "remarriage" in this court.

II
QUESTION PRESENTED

The question certified squarely states the issue:

LAW OFFICES, PODHURST, ORSECK & PARKS, P.A.—OF COUNSEL, WALTER H. BECKHAM, JR.
66 WEST FLAGLER STREET, MIAMI, FLORIDA 33130

WHETHER OR NOT IN A WRONGFUL DEATH ACTION UNDER 768.02, F.S. 1969, BROUGHT BY ONE SPOUSE TO COLLECT DAMAGES RESULTING FROM THE WRONGFUL DEATH OF THE OTHER SPOUSE, EVIDENCE OF PLAINTIFF'S REMARRIAGE IS ADMISSIBLE TO MITIGATE DAMAGES.

III
ARGUMENT

PROOF OF REMARRIAGE INADMISSIBLE FOR ANY PURPOSE--DECISION BELOW EMINENTLY CORRECT AND QUESTION CERTIFIED SHOULD BE ANSWERED IN THE NEGATIVE

A) FLORIDA DECISIONS ACTUALLY HAVE ANSWERED QUESTION IN NEGATIVE IN ACCORDANCE WITH OVERWHELMING WEIGHT OF AUTHORITY

The "remarriage" issue is raised by defendants time and again throughout Florida. Actually, however, the issue already has been passed upon directly on prior occasions by the Third District, and those decisions, like the decision of the Fourth District here, are in total accordance with the overwhelming weight of authority on the point. In Town of Miami Springs v. Borreca, Fla. App. 1959, 110 So. 2d 519 cert. den., 114 So. 2d 4, a plaintiff-widow sought damages for the wrongful death of her husband. The plaintiff remarried prior to the trial of the case, and the trial court denied a motion to require the plaintiff to amend the style of the cause to reflect her new married name. The court there, as here, excluded evidence or intimation, or argument of counsel of the remarriage. A verdict of $175,000.00 was returned.

On appeal, the defendant challenged the remarriage ruling. The Third District Court of Appeal affirmed the judgment "per curiam" (110 So. 2d 519). This court denied a petition for certiorari (114 So. 2d 4).[1] The Third District decision was "per curiam". However, the decision is nonetheless authoritative. This is so because logic and common sense and the law say so.

In South Florida Hospital Corp. v. McCrea, Fla. 1960, 118 So. 2d 25, 31, this court discussed the significance of a "per curiam affirmed" decision:

> ". . .The word 'affirmed' so used necessarily means that the appellate court has carefully examined all points raised by all appealing parties and found them to be without merit." (See also, Foley v. Weaver Drugs, Inc., Fla. 1965, 177 So. 2d 221)

In Newmons v. Lake Worth Drainage District, Fla. 1956, 87 So. 2d 49, 50, this court said:

> "Such an opinion carries no less weight because of the nomenclature that designates it as such. 32 Words and Phrases, Per Curiam; Black's Law Dictionary, Minor v. Fike, 77 Kan. 806, 93 P 264; Clarke v. Western Assur. Co., 146 Pa. 561, 23 A. 248, 15 L.R.A. 127 . . ."

---

[1] In F. E. C. v. Keilen, Fla. App. 1966, 183 So. 2d 547, a verdict and judgment of $86,000 was upheld on appeal to the Third District over a defense claim of error in exclusion of remarriage references. The trial court ruled that the plaintiff would be designated "Mrs. Keilen" despite her remarriage to a man of another name. The Third District Court of Appeal had no difficulty in affirming.

LAW OFFICES, PODHURST, ORSECK & PARKS, P.A. OF COUNSEL WALTER H. BECKHAM, JR.
30 WEST FLAGLER STREET, MIAMI, FLORIDA 33130

The Fourth District Court of Appeal reached the same result here stating in part that:

> "Although the hardship imposed upon the widow by her husband's death may be alleviated by a second marriage, the damages flowing from the death of the first husband are in nowise affected." (250 So. 2d at 317)

The Court properly reasoned that the widow's damages are assessed by circumstances existing at and prior to the time of death and that "a wrong-doer cannot diminish his damages by evidence of benefits flowing to the claimant from an independent collateral source." (250 So. 2d at 317-318).

The Third and Fourth District decisions follow a mass of Florida authorities which establish the collateral source rule in analagous situations: Smith v. Whidden, Fla. 1956, 87 So. 2d 42; Frazier v. Ewell Engineering & Contracting Co., (Fla. 1952), 62 So. 2d 51; Wadsworth v. Friend, Fla. App. 1967, 201 So. 2d 641; O'Neill v. Ray, Fla. App. 1968, 213 So. 2d 1; Paradis v. Thomas, Fla. App. 1963, 150 So. 2d 457; Greyhound Corp. v. Ford, Fla. App. 1963, 157 So. 2d 427.

The Florida law, both in this precise situation, and in closely analagous "collateral source" situations, obviously supports the decision below.

B) OVERWHELMING WEIGHT OF REASONED AUTHORITY SUPPORTS DECISION BELOW

The exclusion of evidence of remarriage, or reference thereto, as might be expected, is not a new, novel, or unique ruling. To the contrary, there is a plethora of cases on the point, which overwhelmingly establish, in accordance with logic and common sense, that proof of, or reference to remarriage is irrelevant, unjustified, calculated only to prejudice, and is against

LAW OFFICES, PODHURST ORSECK & PARKS, P.A.—OF COUNSEL WALTER H. BECKHAM, JR.
66 WEST FLAGLER STREET, MIAMI, FLORIDA 33130

public policy.

At this time, no less than 23 jurisdictions in the United States of America, as well as the United States in determining the issue under Federal damages statutes, have ruled against proof of remarriage for mitigation of damages or for any other purpose. Only 2 allow it--and one of those jurisdictions, Wisconsin, in its case allowing such proof relied upon a Michigan case which has been overruled by the Michigan Supreme Court.

As far as research now reveals, the jurisdictions at this time line up as follows:

AGAINST PROOF OF REMARRIAGE

United States.--Brooks v. United States, D.C.S.C.1967, 273 F.Supp. 619, (Federal Tort Claims Act); Dixon v. Serodino, 6 Cir., 331 F.2d 668 (Jones Act); U.S. v. S.S. Washington, D.C.Va.1959, 172 F.Supp. 905 (Death on the High Seas Act); The City of Rome (1930, DC NY) 48 F.2d 333; Petition of United States (1950, DC NY) 92 F.Supp.495; United States v. The Washington (1959, DC Va) 172 F. Supp. 905, aff'd on op below United States v. Texas Co. (CA4) 272 F.2d 711; Blumenthal v. United States (1960, DC Pa) 189 F. Supp. 439

Arizona.--Hing v. Youtsey, Ariz.1969, 460 P.2d 646

Arkansas.--St. Louis I.M. &S.R. Co. v. Cleere (1905) 76 Ark 377, 88 S.W. 995

California.--Barth v. B.F. Goodrich Tire Co., Cal.App.1968, 71 Cal. Rptr.306; Benweil v. Dean, 249 Cal.App.2d 345; 57 Cal.Rptr.394

Delaware.--Reynolds v. Willis, Del.Sup., 209 A.2d 760

D.C.--Coleman v. Moore, D.C. Dt.1952, 108 F.Sup.425

Florida.--Town of Miami Springs v. Borreca, supra; F.E.C.R. Co. v. Kellen, supra; S.C.L.R. Co. v. Hill, supra (decision below)

Georgia.--Georgia R. & Banking Co. v. Carr (1876) 57 Ga.277, 24 Am Rep 492

Illinois.--Chicago & E.I.R. Co. v. Driscoll (1903) 207 Ill 9, 69 NE 620. See also O.S. Richardson Fueling Co. v. Peters (1899)

82 Ill App 508, infra.

Indiana.--Consolidated Stone Co. v. Morgan (1903) 160 Ind 241, 66 NE 696; Wabash R. Co. v. Gaetzinger (1914) 182 Ind 155, 104 NE 69; Central Indiana R. Co. v. Anderson Banking Co., Ind. 1968, 240 NE. 2d 240 [actually decided under Federal Employer's Liability Act]

Kentucky.--Archer v. Bowling (1915) 166 Ky 139, 179 SW 15

Louisiana.--McFarland v. Illinois C. R. Co. (1961) 241 La 15, 127 So. 2d 133; Stephens v. Natchitoches Parish School Board (1959, LaApp) 110 So. 2d 156, revd on other grounds 238 La 388, 115 So. 2d 793; Stephens v. Natchitoches Parish School Board (1962, La App) 137 So. 2d 116. See, however, O'Connor v. Chicago, R.I. & P.R.Co. (1949, La App) 40 So. 2d 663

Michigan.--Bunda v. Hardwick, 376 Mich. 640, 138 N.W. 2d 305 (1965) [overruling prior Mich. decision]

Minnesota.--Murphy v. Barlow Realty Co., 214 Minn. 64, 7 N.W. 2d 684

Missouri.--Davis v. Springfield Hospital (1920) 204 Mo App 626, 218 SW 696; Platt v. Cape Girardeau Bell Tel. Co. (1929, Mo App) 12 SW. 2d 933

Nebraska.--Chicago, St. P.M. & O. R. Co. v. Lagerkrans (1902) 65 Neb 566, 91 NW 358, 95 NW 2.

New York.--Lees v. New York Consol. R. Co. (1919) 109 Misc 608, 180 NYS 546

Ohio.--Davis v. Guarnieri (1887) 45 Ohio St. 470, 15 NE 350, 4 Am St Rep 548

Oregon--Prauss v. Adamski (1952) 195 Or 1, 244 P. 2d 598; Raymond v. So. Pac. R. Co. 1971, 488 P. 2d 460

Pennsylvania.--Philpott v. Pennsylvania R. Co. (1896) 175 Pa 570, 34 A 856

Rhode Island.-- Weisel v. Cicerone, R.I. 1970, 261 A. 2d 889

Texas.--Gulf, C. & S.F.R. Co. v. Younger (1897) 90 Tex 387, 38 SW 1121; International & G. N.R. Co. v. Boykin (1905, Tex Civ App) 85 SW 1163, revd on other grounds 99 Tex 259, 89 SW 639; Texas E.R. Co. v. Stewart (1919, Tex Civ App) 85 SW 1081, error ref; Gulf, C. &. S. F. R. Co. v. Moser (1925, Tex Civ App) 227 SW 722, revd on other grounds 275 US 133, 72 L ed 200, 48 S Ct 49. See, however, Dixie Motor Coach Corp. v. Shivers (1939, Tex Civ App) 131 SW. 2d 677, error dismd.

LAW OFFICES, PODHURST, ORSECK & PARKS, P.A. OF COUNSEL, WALTER H. BECKHAM, JR.
66 WEST FLAGLER STREET, MIAMI, FLORIDA 33130

Virginia.--See Seaboard Air Line R. Co. v. Connor (1958, CA 4 Va) 261 F. 2d 656

West Virginia.--Dimmey v. Wheeling & E.G.R. Co. (1885) 27 W Va 32, 55 A, Rep 292

ALLOWING PROOF

Mississippi.--Camel v. Schmitt, Miss. 1967, 195 So. 2d 37

Wisconsin.--Jensen v. Heritage Mutual Ins. Co., Wisc. 1964, 127 N. W. 2d 223 [Relying on Michigan authority specifically overruled in Bunda).

(See cases and discussion on issue 37 A. L. R. 2d 252-263 and later case service)

And even more significant, if possible, than the sheer weight of authority is the reasoning behind it. The following reasons, time and again set forth in the cases, are assigned for the exclusionary rule:

1) Marriage is a personal relationship and damages are allowed for loss of a specific spouse--of the widow's own choice. Public policy forbids the fiction that the remarriage replaces the deceased husband. Public policy forbids speculation on comparative values and virtues of the deceased husband, and even the attempt to do so. Comparisons between the comfort, companionship, protection, marital relations and support of wife and children afforded by the new husband and that afforded by the deceased are unthinkable, speculative and against public policy.

Indeed, the underlying thinking in the defense position seems to be that a deceased child could be replaced simply by the offer or tender of another to a bereaved parent.

Comparisons of merits of respective husbands are fraught with mischief. Should the subsequent conjugal venture prove happier and more beneficial, it is

LAW OFFICES, PODHURST, ORSECK & PARKS, P.A.—OF COUNSEL, WALTER H. BECKHAM, JR.
66 WEST FLAGLER STREET, MIAMI, FLORIDA 33130

unthinkable that the defendant should be rewarded.

The termination of a marriage ends a specific relationship--a specific supplication of support, pecuniary and otherwise, and comfort, protection and relations. Death ends it and deprives the wife of specific benefits. That loss is real and subsisting and fixed, and there is and can be no mitigation of damages, whether loss of pecuniary support or otherwise, simply because the widow may have entered into a new relationship which will result in benefits similar to those she has lost by the death. The law simply will not permit attempts to prove that the second husband was the "equal" of the first. Such attempts would lead to utter confusion, and the prejudice would far outweigh any possible relevancy.

Thus, even if it be assumed, arguendo, that there were some tangential relevance involved in the references to the plaintiff's present name, that relevance is more than over-balanced by the intensely prejudicial effects of a jury's knowing that a plaintiff no longer has her deceased husband's name.

Our Supreme Court has recognized that evidence which has only slight relevance and intense prejudice should be excluded. In Perper v. Edell, 44 So. 2d 78, 80, the Supreme Court said:

> "We conceive the rule to be that, if the introduction of the evidence tends in actual operation to produce a confusion in the minds of the jurors in excess of the legitimate probative effect of such evidence--if it tends to obscure rather than illuminate the true issue before the jury--then such evidence should be excluded. Wigmore on Evidence, Third Edition, Section 904; 31 C.J.S., Evidence, §159, page 869; Atlantic Coast Line R. Co. v. Campbell, 104 Fla. 274; 139 So. 886; McCaffrey v. Schwartz, 285 Pa. 561, 132 A. 810; Golden Reward Min. Co. v. Buxton Min. Co., 8 Cir., 97 F. 413; Veer v. Hagemann, 334 Ill. 23, 165 N.E. 175; Biener v. St. Louis Public Service Co., Mo. App. 160 S.W. 2d 780."

> ". . .It is for ordinary minds, and not for psychoanalysts, that our rules of evidence are framed. When the risk of confusion is so great as to upset the balance of advantage, the evidence should be excluded. Shepard v. United States, 290 U.S. 96, 54 S. Ct. 22, 78 L. Ed. 196.
>
> It is our conclusion that the evidence of the physicians relating to Edell's mental incapacity should have been excluded, as tending to confuse and mislead the jury far beyond any probative value which such testimony had. Its admission into evidence was therefore error, and it was not harmless error. . . ."

At the very least, the fact of remarriage should be excluded under that rule.

2) The wrongful act of defendant frequently places the widow and children in a position, financial and otherwise, which would carry with it a compelling reason for remarriage and this would carry with it inquiry at trial into reasons for the remarriage, and thereby would tend to deteriorate the relationship between herself and her present husband.

3) The law favors marriage and a contrary rule would often compel attorneys to advise clients not to remarry. In a wrongful death case the damages are established immediately, but ordinarily a considerable period of time elapses between the death and the trial. During that time, the law does not recognize a rule which would discourage remarriage, and restrain it and cast the widow's burden and that of her children upon society and friends.

4) The defendants wrongful act ought not to force a woman to render an unfavorable comparison between her present husband and the one the defendant killed. It would be only natural that a widow would not wish to explain the full impact of her loss, if such explanation depended upon her making public and unfavorable comparison with her present husband.

LAW OFFICES, PODHURST, ORSECK & PARKS, P.A.—OF COUNSEL, WALTER H. BECKHAM, JR.
63 WEST FLAGLER STREET, MIAMI, FLORIDA 33130

5) Speculation would run rampart on efforts to prove, for example, chances of remarriage, the type of potential mate, or comparisons between the new spouse with the old. Inquiry would be had, against all common sense concepts of decency and privacy, and public policy which favors the marital relationship, into the status of her present marital relations, comfort, companionship, and protection. All of the intimate details of her present marriage would be explored. The widow then would be compelled to compare between husbands.

6) Florida, in accordance with virtually every American jurisdiction, consistently has held that a tortious wrong-doer should get no benefit from advantages afforded to his victim from other or collateral sources, which benefits the defendant in no wise furnished. Damages for wrongful death are based upon loss calculated at the time of death. Subsequent events are immaterial and the collateral source rule holds that:

> ". . . Total or partial compensation for an injury received by the injured party from a collateral source wholly independent of the wrong-doer will not operate to lessen the damages recoverable from the person causing the injury." Paradis v. Thomas, supra.

7) Remarriage affords no real protection to the plaintiff wife and none at all to the minor children. Under our statute and many others, the surviving wife brings the action in her own name. The children are not parties. She does collect items of damages which inure to the benefit of the children, such as loss of future estate, loss of services in taking care of the family, and loss of support for minor children. See Seaboard Railroad Company v. Martin, 56 So. 2d 509, 1952. On the other hand, the new husband legally owes no duty

LAW OFFICES OF PODHURST, ORSECK & PARKS, P.A.—OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET, MIAMI, FLORIDA 33130

to the children to support them or otherwise provide for their well-being. The children have no right to his estate and no right of support from the second husband. In many cases the second husband will already have children of his own when he marries the widow and it is a very likely possibility that his estate, if any, will go to his own children rather than the children of his second wife. Additionally, the children would have no right to child support in the event that the widow and second husband were divorced.

Since the wrongful act of the defendant often places the widow and children in such poverty that she has no choice but to remarry promptly as it did in this case, the possibility of severance of the second marriage is very real. It is understandable that a woman in such situation may make a choice of a marital partner which works out very unhappily, or even results in divorce.

3) The "perjury argument" with reference to calling the widow by her prior married name at trial is ludicrous. The use of the prior name would be permitted only by a rule of law. The only possible reason for inquiry into the present name is to show remarriage, improperly, for prejudicial irrelevant reasons.

In fairness to all, and in accordance with well-established principles proof of remarriage, or mention or suggestion of it, should be excluded.

Since the fact of remarriage cannot properly be considered by the jury, reference to that fact in the course of the trial could have only the most prejudicial effect in the consideration of the damages to which the plaintiff is entitled. Such reference would permit the jury improperly to reduce or "mitigate" his damages. But the courts have ruled that remarriage may not be introduced in evidence, e.g., Hightower v. Dr. Pepper Bottling Co., La. App.

LAW OFFICES, PODHURST ORSECK & PARKS, P.A.—OF COUNSEL, WALTER H. BECKHAM, JR
66 WEST FLAGLER STREET, MIAMI, FLORIDA 33130

1959, 117 So. 2d 642, and cases cited at 37 A. L. R. 2d 260-263, nor referred to in any argument of counsel, Johns v. Baltimore & Ohio R. Co., ED. Pa. 1956, 143 F. Supp. 15, affirmed 3 Cir. 1957, 239 F. 2d 385. The court below was eminently correct.

IV
CONCLUSION

The decision below is eminently correct. The question should be answered in the negative, the writ discharged, and the judgment affirmed.

Respectfully submitted,

ACADEMY OF FLORIDA TRIAL LAWYERS

BY

PODHURST, ORSECK & PARKS, P.A.
Second Floor, Concord Building
66 West Flagler Street
Miami, Florida 33130

ROBERT ORSECK

V.
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Amicus Curiae Brief on Behalf Of The Academy of Florida Trial Lawyers was mailed this 5th day of January, 1972 to: CALDWELL, PACETTI, BARROW & SALISBURY, 324 Royal Palm Way, Palm Beach, Florida and to Beverly and Frates, P.O. Box 909, West Palm Beach, Florida.

ROBERT ORSECK

COPY
reproduced by
FLORIDA STATE ARCHIVES
DEPARTMENT OF STATE
R. A. GRAY BUILDING
Tallahassee, FL 32399-0250
Series 10 52 Carton 15

November 25, 1969

Mr. Don Beverly
Beverly & Frates
Attorney at Law
Post Office Box 909
West Palm Beach, Florida

Dear Don,

Thank you very much for your recent letter dealing with the proposed Wrongful Death Act which the last meeting of the Board of Directors of the Academy of Florida Trial Lawyers discussed.

Answering your second paragaaph, I was not present at the Law Revision Commission meeting in Tampa on November 1. It was my understanding that no important action was contemplated insofar as the proposed Wrongful Death Act was concerned, and I elected to remain here to discharge other responsibilities. A couple of minor matters were raised at the meeting, and this has resulted in two minor changes to clarify them. One is a minor change in language to make it quite clear that it is contemplated that loss of earnings of the deceased from the date of injury to the date of death are recoverable in the proposed wrongful death action. This was contemplated all along, but our language did not seem completely clear to some. This clarifying change has been made. There was also some uncertainty in the minds of some about the recovery of medical or funeral expenses by the decedent's personal representative when they had been paid in advance by the decedent or by someone on his behalf who was not a survivor. This has been clarified to make it clear that medical and funeral expenses are to be recovered by any survivor who has paid, but if anyone else has paid them then they will be recovered by the personal representative. Both these were clarifying changes and do not reflect any ges in substance of the intent of the draftsman or the Commission.

Your third paragraph deals with the effect of Atlas Properties, Inc. v. Didich. It will simplify matters if I go to your paragraph four on page two where your questions are stated. You first asked if the proposed act anticipates that the existing claim for punitive damages will survive the recommended legislative surgery. The legislative intent is that the proposed legislation have no effect on a survival action unless the death results from the personal injury inflicted by the tortfeasor. There is no intent to abolish FS 46.021 in cases where death does not occur. It is not repealed by any section of the proposed Act. As to the second question, that is, will the claim survive the demise of the injured victim or will it dissipate

like his claim for mental and physical pain and suffering incurred before death, I believe it was the intention of the draftsman and the Commission to remain neutral on this question. That is why the provision that no punitive damages would be recoverable was removed from an earlier version. There is a big question in tort law at the present time concerning punitive damages in any kind of civil case. If we could, I think it would be better to keep this controversy out of the consideration of the proposed Wrongful Death Act since it goes far beyond wrongful death actions and affects many kinds of tort litigation where no death occurs. On the other hand, I think you have raised a very legitimate point. There is nothing in our proposed Act specifically dealing with punitive damages now, but our provision that no actions of personal injury shall survive when a personal injury to the decedent results in his death contained in section 768.20 might be construed to eliminate punitive damages from the wrongful death action brought under the proposed Act. This is also colored by the fact that there are Florida cases holding that punitive damages are not recoverable in a wrongful death action. I think you can readily understand why we would have some reluctance to put an express provision in the proposed Act that punitive damages are recoverable in view of the highly controversial nature of such a declaration. Thus it seems to us that perhaps the best policy would be to say nothing about it and leave it to decision. Needless to say, we were unaware of the Atlas Properties case as decided by the Supreme Court of Florida at the time we were drafting the proposed Act. I would like to have any suggestion you might care to make about how we should dispose of this problem, and I am sending copies of this letter to some of the members of the Commission who have been involved in improving the earlier drafts so that they may submit suggestions also. I do not believe that we ought to let a conflict over this particular matter endanger the passage of the bill, and I am open to any reasonable suggestion.

Concerning the matter of attorney's fees dealt with in your sixth paragraph on page two, I believe there is some misunderstanding about what is contemplated by the proposed Act. Section 768.26 provides that attorney's fees and other expenses of litigation shall be paid by the personal representative and deducted from the awards to the survivors and the estate in proportion to the amount awarded to them, etc. This must be read in conjunction with section 768.20 providing that the action shall be brought by the decedent's personal representative, who shall recover for the benefit of the decedent's survivors and estate, etc. The provision on litigation expenses only contemplates the attorney's fees and expenses incurred by the personal representative, providing for the allocation for all these expenses incurred by the personal representative to the awards made to survivors and the estate, which amounts must be separately stated in the verdict as required by section 768.22. It makes no difference whether the personal representative engages one attorney or several. The total amount of litigation expenses as contracted by him (the personal representative), will be allocated against the awards in this way. There is no intention to interfere with any contract made with the attorney or attorneys for fees. We felt it was absolutely essential that some method be provided for a pro rata apportionment, because it might be possible otherwise for the personal representative to charge the fees in a

disproportionate manner to the survivors and the estate. Remember the personal representative is always the plaintiff and not the survivors. Your question obviously contemplates the possibility of a number of plaintiffs, but the Act will not permit this. If some survivor sees fit to engage counsel to represent his interests alone, this does not make that survivor a plaintiff in the wrongful death action, and any attorneys' fees to be paid by such a survivor would be purely a matter of contract between him and the attorney and would not be payable out of any amounts recovered under the proposed Act. I hope this clarifies this matter, because I believe you will agree on further consideration that it is a fairly reasonable provision, since expenses of litigation are usually deducted from recoveries in wrongful death actions where the contract for attorneys' fees is normally on a contingent basis. The reason this question has not troubled us in the past is because there is only one class able to recover under the present Wrongful Death Act of Florida, and others who suffer losses do not pay any attorney's fees because they don't get any award as they will under the new Act. Since there may be quite a few survivors plus the estate sharing in a recovery under the proposed Act, it becomes necessary to provide some rational system for allocating the litigation expense to their awards. Thus the importance of the provision that the awards must be stated separately in the verdict.

I appreciate the kind words contained in your concluding paragraphs. You can be quite sure that the draftsman and the Commission have been strictly concerned with producing a new Wrongful Death Act that will do justice to everyone and reflect an enlightened concern for the interest of the general public in this area. I am also concerned about the wrongful death of a viable unborn infant, that you mention, but an earlier provision we had included on this matter probably resulted in the defeat of the proposed Act in the last session of the Legislature. I believe the best way to handle that problem is separate legislation rather than risk the defeat of the entire proposed Act.

I am impressed with the statesmanlikeposition you have taken in your letter of November 7th, because you obviously appreciate that the proposed Act cannot be fashioned to meet all the wishes of every group and still have an act that can be enacted. The compromise we have achieved has a fair chance of enactment, I believe, and yet it does provide a far better system of compensation for those who suffer the consequences of the wrongful death of a near relative than present law in this State.

Please let me hear from you again at your convenience. Again, Many thanks.

Sincerely,

L. S. Powers
Associate Dean

cc: Mr. James Quarles, Mr. Henry P. Trawick, Mr. Henry Kittleson

February 20, 1970

Mr. Bill Wagner
Wagner, Cunningham & Vaughan
403 Morgan Street, Suite 102
Tampa, Florida 33602

Dear Bill:

Please accept my apology for the delay in replying to your letters about the proposed death act. You have probably already heard about the resignation of Dean Maloney. This has resulted in some disarray here at the law school, and my own situation has been complicated by illness from which I have now recovered. I am just getting caught upp with my correspondence.

I won't attempt to answer every point that you raise in your letter. Let me say first, however, that I am very grateful to you for calling our attention to the fact that the effective date in the repealer did not fit. This came about because an earlier version of the proposal provided that the new act would be effective upon enactment, but later it was decided that it would be better to establish some future date as the effective date. This was done, but no one remembered to change the repealer clause to fit it. We have done this now, and I am sure you have a copy of the pamphlet containing the new language.

Concerning the approval of settlement, I don't think we can do anything about settlements before an action is filed. Since under the proposed act the only one who could settle with the tortfeasor would be the personal representative of the deceased, presumably he would be subject to the orders of the court appointing him to act in a fiduciary capacity so that he could be removed and fraudulent settlements set aside, etc. Section 768.25 on court approval of settlements provides that there can be a settlement even where there is objection or there is a minor provided the settlement is approved by the court. Again, a settlement would be between the personal representative of the deceased and the tortfeasor rather than between the survivors and the tortfeasor.

We certainly intended that adopted children would be within the definition of minor children. At one point we expressly included them in the definitions section, but several members of the Law Revision Commission thought

that was unnecessary in view of the Florida legislation making the rights of adopted children the same as natural children.

I understand your objection to the term "dependent", but I do not know what the solution is. As to limiting the recovery for support to 21 years, this is intended only in the case of healthy minor children. See Section 768.21 (1).

As to Section 768. 26 dealing with litigation expenses, this is intended to cover only the fees paid by the personal representative. After all, the proposed act only contemplates that the personal representative will be a plaintiff, and it is the fees that he pays for representation in the action that this section is designed to cover. To answer your question very directly, the statute contemplates that the claimants shall all sink or swim together. They are not parties, and if they have their own lawyers they can make whatever contract for fees that they like. It will not come out of the settlementor judgement amounts that are received by the personal representative for distribution to them. We felt that something had to be provided on this, or else someone might claim that the entire amount of the legal fees paid by the personal representative should come out of the portion going to the estate of the deceased. Your suggestion that we insert the expression "In the absence of written agreement to the contrary" at the beginning of the section under consideration would not be very fair if the personal representative entered into a written agreement that the attorney fees would be paid entirely from one of the survivor's shares. The section contemplates a fair and equitable contribution by all beneficiaries to the attorney's fees and other expenses of litigation.

To answer another question, all the claimants are required to make their claim in the same action. They cannot release the defendant; only the personal representative of the deceased can do that.

There is no hiatus possible, in my opinion, between a claim under F.S. 45.11 and one arising under the new act if the death takes place in 1971. If the death takes place in 1971, then the new act controls both as to the disposition of the survival claim and damages for wrongful death. In other words, the claim that the deceased had while he still lived will, after December 31, 1970, abate and be part of the new action for wrongful death.

On the same reasoning as was used above concerning adoptive children, believe the definition section includes adoptive parents in the term "parents". It does not include step-parents who have no legal status unless there has been an adoption.

This is not answering every point you raised, but I think they are the most important ones. Some of your other comments raise very hard questions that I doubt any legislation can effectively solve. In reply to your last paragraph about the legal philosophers, the Law Revision Commission has very carefully considered the suggestions that have come from many trial lawyers who have responded to the Commission's invitation to comment as you have done. I do hope that you will feel quite free to raise any further questions you have or to re-raise any that you think important that I have failed to comment upon.

In any event, it is certainly my hope that you will be able to support this needed reform in the law of Florida, for I sincerely believe that the proposed statute will provide a far better statutory basis for wrongful death litigation than we now have. Certainly, the effort to provide compensation for all of the survivors of deceased persons who have suffered losses is a great improvement over the class system we presently have.

Again, please accept my apology for this tardy reply. Come to see us.

Sincerely yours,

L. S. Powers
Associate Dean

LSP:slm
cc. Professor James Quarles

DRAFT OF RECOMMENDED DEATH ACT

Section 1. Sections 768.01, 768.02, and 768.03, Florida Statutes, are hereby repealed.

Section 2. Short Title. This act may be cited as the "Florida Wrongful Death Act."

Section 3. State policy. It is the public policy of the state to shift the losses resulting when wrongful death occurs from the survivors of the decedent to the wrongdoer. This act is remedial and shall be liberally construed.

Section 4. Definitions. As used in this act:

(1) "Survivors" means the decedent's spouse, minor children, parents, and, when partly or wholly dependent on the decedent for support or services, any blood relatives and adoptive brothers and sisters. It includes the illegitimate child of a mother, but not the illegitimate child of the father unless the father has recognized a responsibility for the child's support by financial contribution or otherwise.

(2) "Minor children" means unmarried children under twenty-one years of age.

(3) "Support" includes contributions in kind as well as money.

(4) "Services" means tasks, usually of a household nature, regularly performed by the decedent that will be a necessary expense to the survivors of the decedent. These services may vary according to the

identity of the decedent and survivor and shall be determined under the particular facts of each case.

(5) "Net accumulations" means the part of the decedent's expected net business or salary income, including pension benefits and income from life estates, that the decedent probably would have retained as savings and left as part of his estate if he had lived his normal life expectancy. Net business or salary income is the part of the decedent's probable gross income after taxes, excluding income from investments continuing beyond death, that remains after deducting the decedent's personal expenses and support of survivors excluding contributions in kind.

Section 5. Right of action. When the death of a person is caused by the wrongful act, negligence, default, or breach of contract or warranty of any person, and the event would have entitled the person injured to maintain an action and recover damages if death had not ensued, the person or watercraft that would have been liable in damages if death had not ensued shall be liable for damages as specified in this act notwithstanding the death of the person injured, although death was caused under circumstances constituting a felony.

Section 6. Parties. The action shall be brought by the decedent's personal representative, who shall recover for the use and benefit of the decedent's survivors and estate all damages, as specified in this act, caused by the injury resulting in death. When a personal injury results in the death, no action for personal injuries of the decedent shall survive, and any action pending at the time of death shall abate.

The wrongdoer's personal representative shall be the defendant if the wrongdoer dies before or pending the action. A defense that would bar or reduce a survivor's recovery if he were the plaintiff may be asserted against him, but shall not affect the recovery of any other survivor.

Section 7. Damages. All potential beneficiaries of a recovery for wrongful death, including the decedent's estate, shall be identified in the complaint and their relationships to the decedent shall be alleged. No punitive damages shall be awarded under this act. Damages may be awarded as follows:

(1) Each survivor may recover the fair value of lost support and services from the time of the decedent's injury to his death, with interest, and future loss of support and services from the time of death and reduced to present value. In evaluating loss of support and services, the survivor's relationship to the decedent, the amount of the decedent's probable net income available for distribution to the particular survivor, and the replacement value of the decedent's services to the survivor may be considered. In computing the duration of future losses, the joint life expectancies of the survivor and the decedent and the period of minority in the case of healthy minor children may be considered.

(2) The surviving spouse may also recover a reasonable amount for loss of the decedent's companionship and protection and for mental pain and suffering from the date of injury.

(3) Minor children of the decedent may also recover a reasonable amount for lost parental companionship, instruction, and guidance and for mental pain and suffering from the date of injury.

(4) Each parent of a deceased minor child may also recover a reasonable amount for mental pain and suffering from the date of injury.

(5) Medical or funeral expenses due to the decedent's injury or death may be recovered by a survivor who has paid them.

(6) The decedent's personal representative may recover for the estate the following:

(a) The net accumulations lost to the estate due to the decedent's injury, with interest. This amount may not be calculated beyond death unless the decedent's survivors include a surviving spouse or lineal descendants. If the decedent's survivors include a surviving spouse or lineal descendants, loss of net accumulations beyond death and reduced to present value may be recovered.

(b) Medical or funeral expenses due to the decedent's injury or death that have become a charge against the estate.

(7) All awards for the decedent's estate are subject to the claims of creditors as provided in §733.16.

Section 8. Separate awards. The amounts awarded to each survivor and to the estate shall be stated separately.

Section 9. Protection of minors and incompetents. The court may put in trust or provide other protection for any amount awarded for the benefit of a minor child or an incompetent.

Section 10. Death of a survivor before judgment. A survivor's death before final judgment shall limit the survivor's recovery to lost support and services to the date of his death. The personal representative shall pay the amount recovered to the estate of the deceased survivor.

Section 11. Settlement. When an action under this act is pending, the court must approve any settlement as to amount and apportionment among the beneficiaries if any survivor objects to the settlement or is a minor or incompetent.

Section 12. Litigation expenses. Attorneys' fees and other expenses of litigation shall be paid by the personal representative and deducted from the awards to the survivors and the estate in proportion to the amount awarded to them, but particular expenses shall be deducted from the awards to survivors who received the benefit of the expenses.

Section 13. Effective date. This act shall take effect on January 1, 1970, and shall not apply to deaths occurring before that date.

STATE OF FLORIDA

FLORIDA LAW REVISION COMMISSION

Recommendations and Report on

FLORIDA WRONGFUL DEATH STATUTES

December 1969

FLORIDA LAW REVISION COMMISSION
College of Law
University of Florida

FLORIDA LAW REVISION COMMISSION

Henry P. Trawick, Jr., *Chairman*
Lawyers Professional Building
2051 Main Street
Sarasota, Florida 33577

Henry M. Kittleson, *Vice Chairman*
92 Lake Wire Drive
P. O. Drawer BW
Lakeland, Florida 33802

Senator Lawton Chiles, Jr.
221 E. Lime Street
Lakeland, Florida 33801

Representative Joel K. Gustafson
307 International Building
2455 East Sunrise Boulevard
Fort Lauderdale, Florida 33316

Marshall C. Cohen, Jr.
First Federal Savings Bldg.
301 East Las Olas Boulevard
Fort Lauderdale, Florida 33301

Wade L. Hopping
Barnett Bank Building
P. O. Box 4099
Jacksonville, Florida 32201

Representative Talbot D'Alemberte
1300 First National Bank Building
Miami, Florida 33131

R. Bruce Jones
Flagler Court Building
P. O. Box 2069
West Palm Beach, Florida 33402

David F. Dickson
College of Law
Florida State University
Tallahassee, Florida 32306

Senator Joseph A. McClain, Jr.
615 Marine Bank Building
Tampa, Florida 33602

W. E. Grissett, Jr.
1603 Barnett Bank Building
Jacksonville, Florida 32202

Robert W. Rust
202 Phipps Plaza
Palm Beach, Florida 33480

James C. Quarles, *Executive Director*
College of Law
University of Florida
Gainesville, Florida 32601

FLORIDA LAW REVISION COMMISSION

RECOMMENDATION AND

REPORT ON PROPOSED REVISION OF FLORIDA

WRONGFUL DEATH AND SURVIVAL STATUTES

Reporter: L. S. Powers, Associate Dean

University of Florida

College of Law

Gainesville, Florida

FOREWORD

The Florida Law Revision Commission was created by the 1967 Legislature (§§13.90 - 13.996 Florida Statutes). In terms of the Statute the Commission is to:

> "(1) examine the common law, constitution and statutes of the state and current judicial decisions for the purpose of discovering defects and anachronisms in the end and recommending needed reforms; (2) recommend, from time to time, such changes in the law as it deems proper to modify or eliminate antiquated and inequitable rules of law, and to bring the law of the state into harmony with modern conditions; (3) conduct such surveys or research of the law of Florida as the Legislature may request."

The Commission presents to the Bench and Bar of Florida, for consideration and suggestions for improvement, the following recommendation and report on a proposed statute on the subject of death by wrongful act.

The Commission requests that all suggestions be submitted as soon as possible, and in any event before January 30, 1970, to any Commission member or to the Commission office in Gainesville.

December 20, 1969

TABLE OF CONTENTS

Page Number

I. Introduction 7

II. Recommended Wrongful Death Act 9

III. Death by Wrongful Act at Common Law 13

A. Lord Ellenborough's dictum in Baker v. Bolton (1808) 13

B. Historic origins of rule against recovery 13

C. The rule in America 14

IV. Statutory Remedies for Death by Wrongful Act 15

A. Lord Campbell's Act 15

1. Parliamentary intent 16

2. Distinctive features of the act 17

B. Florida's acts affecting wrongful death 17

1. F.S. §46.021 - Survival Statute 17

2. F.S. §768.01 - Death Act 18

a. Laws 1883, c. 3439, §1 - Original enactment.
b. 1915 Amendment - To provide a death action in Admiralty.
c. 1953 Amendment - To provide action for breach of warranty.

3. F.S. §768.02 - Parties and Damages 20

a. Laws 1883, c. 3439, §2 - Original enactment.
b. 1907 Amendment - to allow the action to survive the death of the primary beneficiary.

4. F.S. §768.03 - Actions for death of minor child 22

a. Laws 1899, c. 4722, §1 - Original enactment.
b. 1913 Amendment - Liability of "individuals" added to void finding of unconstitutionally based upon corporate discrimination.
c. 1963 Amendment - To provide action for breach of warranty.

C. Comparison of Florida death acts and Lord Campbell's Act 23

V. Survey of American Death Acts and the Florida Acts 25

A. Acts giving rise to liability 25

1. Torts 25

2. Strict Liability 26

3. Breach of contract 26

4. Breach of warranty 26

5. Unseaworthiness 27

B. Theories of damages 27

1. Survival statutes 28

2. Loss to survivors death acts 28

3. Loss to estate death acts 30

VI. Defects in the Florida law of wrongful death 33

A. Mechanics 33

1. Hierarchy of beneficiaries 33

a. Multiplicity of law suits.
b. No compensation for all dependents.

2. Damages 34

a. Loss to survivors.
b. Loss to estate.

B. Factual examples 35

C. Miscellaneous problems 37

VII. Recommendations for revision 41

I. INTRODUCTION

Wrongful deaths acts throughout the United States are in a state of disarray. Florida's is no exception. Some of the results that are possible under the wrongful death legislation of Florida can only be fairly described as deplorable. The Florida courts have increasingly called attention to these defects, and some of the recent judicial calls for legislative help have had a plaintive and desperate quality.

An impressive effort to answer the calls for help occurred in 1957 with the publication of "The Florida Death Acts" by Leo M. Alpert, Esq., in 10 University of Florida Law Review 153 (1957). Mr. Alpert concluded his article with a bill introduced in the 1957 Legislature by Messrs. Sweeny and Karl of Volusia County, which would have completely rewritten F.S. Section 768.02 in order to eliminate some of the defects. It was killed in committee. It is hoped that this current effort will meet a better fate.

Another very valuable study entitled "Florida's Wrongful Death Law: Time for a Change" was written by David K. Deitrich, Esq., when he was a law student at the University of Florida. It may be found in 18 University of Florida Law Review 637 (1966).

There are several things wrong with the wrongful death situation in Florida, but suffice it to say here that Florida's current position seems to be to minimize recoveries when there are many dependents left by the deceased and to maximize recoveries when no one is left dependent on the deceased. It takes no expert in the law to realize that this policy is diametrically opposed to what one would expect to be the objective in this area. Further, dependents of the deceased sometimes most deserving and needful of support are occasionally left without any recovery at all. As if these horribles were not enough, the present state of our law encourages a multiplicity of litigation and a great deal of uncertainty about the damages recoverable.

In submitting this proposal for change, the reporter is not naive enough to think that there will not be some objection. This is a fairly sensitive area of the law where legal fees are often measured by the amount of recovery, and so anything that tends to minimize or maximize amounts currently recoverable may generate some opposition from lawyers who are deeply committed to the cause of plantiffs or defendants. We have endeavored in drafting a statute to ignore this approach and consider only the valid objective of such legislation. This objective is to allow a full recovery on behalf of those who were

dependent on the deceased and who have sustained demonstrable losses of support and services by the wrongful death. In drafting with that objective constantly in mind, this proposal will increase damages in some instances and decrease them in others as compared to the present law. Such result is unavoidable.

If those interested in such legislation approach it from the standpoint of only favoring those aspects that favor their own position in such law suits, then we will probably have another stand-off and there will be no reform in 1969 just as in 1957. It would be most gratifying if the approach would be instead to consider that the pluses and minuses strike an approximate balance in the end, and that this proposal has the supreme virtue over the present law in that it assures that the recovery will go to those who really need it and not as windfalls to distant relatives. No affront is intended when it is suggested that all concerned view this proposal from a statesmanlike point of view.

II. RECOMMENDED WRONGFUL DEATH ACT

A bill to be entitled

An act relating to wrongful death action; amending chapter 768, Florida Statutes, by adding sections 768.16, 768.17, 768.18, 768.19, 768.20, 768.21, 768.22, 768.23, 768.24, 768.25, 768.26, and 768.27; providing for a right of action on behalf of the survivors and the estate by the personal representative of a decedent whose death is caused by the wrongful act, negligence, default, or breach of contract or warranty of any person; repealing sections 768.01, 768.02, and 768.03, Florida Statutes; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Chapter 768, Florida Statutes, is amended by adding sections 768.16, 768.17, 768.18, 768.19, 768.20, 768.21, 768.22, 768.23, 768.24, 768.25, 768.26, and 768.27 to read:

768.16 Short title.—Sections 768.16 through 768.27 may be cited as the "Florida wrongful death act."

768.17 Legislative intent.—It is the public policy of the state to shift the losses resulting when wrongful death occurs from the survivors of the decedent to the wrongdoer. Sections 768.16 through 768.27 are remedial and shall be liberally construed.

768.18 Definitions.—As used in sections 768.16 through 768.27:

(1) "Survivors" means the decedent's spouse, minor children, parents, and, when partly or wholly dependent on the decedent for support or services, any blood relatives and adoptive brothers and sisters. It includes the illegitimate child of a mother, but not the illegitimate child of the father unless the father has recognized a responsibility for the child's support.

(2) "Minor children" means unmarried children under twenty-one (21) years of age.

(3) "Support" includes contributions in kind as well as money.

(4) "Services" means tasks, usually of a household nature, regularly performed by the decedent that will be a necessary expense to the survivors of the decedent. These services may vary according to the identity of the decedent and survivor and shall be determined under the particular facts of each case.

(5) "Net accumulations" means the part of the decedent's expected net business or salary income, including pension benefits, that the decedent probably would have retained as savings and left as part of his estate if he had lived his normal life expectancy. Net business or salary income is the part of the decedent's probable gross income after taxes, excluding income from investments continuing beyond death, that remains after deducting the decedent's personal expenses and support of survivors excluding contributions in kind.

768.19 Right of action.—When the death of a person is caused by the wrongful act, negligence, default, or breach of contract or warranty of any person, including those occurring on navigable waters, and the event would have entitled the person injured to maintain an action and recover damages if death had not ensued, the person or watercraft that would have been liable in damages if death had not ensued shall be liable for damages as specified in this act nothwithstanding the death of the person injured, although death was caused under circumstances constituting a felony.

768.20 Parties.—The action shall be brought by the decedent's personal representative, who shall recover for the benefit of the decedent's survivors and estate all damages, as specified in this act, caused by the injury resulting in death. When a personal injury to the decedent results in his death, no action for the personal injury shall survive, and any such action pending at the time of death shall abate. The wrongdoer's personal representative shall be the defendant if the wrongdoer dies before or pending the action. A defense that would bar or reduce a survivor's recovery if he were the plaintiff may be asserted against him, but shall not affect the recovery of any other survivor.

768.21 Damages.—All potential beneficiaries of a recovery for wrongful death, including the decedent's estate, shall be identified in the complaint and their relationships to the decedent shall be alleged. Damages may be awarded as follows:

(1) Each survivor may recover the value of lost support and services from the date of the decedent's injury to his death, with interest, and future loss of support and services from the date of death and reduced to present value. In evaluating loss of support and services, the survivor's relationship to the decedent, the amount of the decedent's probable net income available for distribution to the particular survivor, and the replacement value of the decedent's services to the survivor may be considered. In computing the duration of future losses, the joint life expectancies of the survivor and the decedent and the period of minority in the case of healthy minor children may be considered.

(2) The surviving spouse may also recover for loss of the decedent's companionship and protection and for mental pain and suffering from the date of injury.

(3) Minor children of the decedent may also recover for lost parental companionship, instruction, and guidance and for mental pain and suffering from the date of injury.

(4) Each parent of a deceased minor child may also recover for mental pain and suffering from the date of injury.

(5) Medical or funeral expenses due to the decedent's injury or death may be recovered by a survivor who has paid them.

(6) The decedent's personal representative may recover for the decedent's estate the following:

injury (a) Loss of earnings of the deceased from the date of ~~inquiry.~~ to the date of death, less lost support of survivors excluding contributions in kind, with interest. If the decedent's survivors include a surviving spouse or lineal descendents, loss of net accumulations beyond death and reduced to present value may also be recovered.

(b) Medical or funeral expenses due to the decedent's injury or death that have become a charge against his estate or that were paid by or on behalf of decedent, excluding amounts recoverable under subsection (5).

(7) All awards for the decedent's estate are subject to the claims of creditors who have complied with the requirements of probate law concerning claims.

768.22 Form of verdict.—The amounts awarded to each survivor and to the estate shall be stated separately in the verdict.

768.23 Protection of minors and incompetents.—The court may put in trust or provide other protection for any amount awarded for the benefit of a minor child or an incompetent.

768.24 Death of a survivor before judgment.—A survivor's death before final judgment shall limit the survivor's recovery to lost support and services to the date of his death. The personal representative shall pay the amount recovered to the personal representative of the deceased survivor.

768.25 Court approval of settlements.—While an action under this act is pending, no settlement as to amount or apportionment among the beneficiaries which is objected to by any survivor or which affects a survivor who is a minor or an incompetent shall be effective unless approved by the court.

768.26 Litigation expenses.—Attorneys' fees and other expenses of litigation shall be paid by the personal representative and deducted from the awards to the survivors and the estate in proportion to the amount awarded to them, but expenses incurred for the benefit of a particular survivor or the estate shall be paid from their awards.

768.27 Effective date. —Sections 768.16 through 768.27 shall take effect on January 1, 1971, and shall not apply to deaths occurring before that date.

Section 2. Sections 768.01, 768.02, and 768.03, Florida Statutes, are repealed when this Act takes effect.

III. DEATH BY WRONGFUL ACT AT COMMON LAW

A. *Lord Ellenborough's dictum in Baker v. Bolton (1808).* The common law rule recognized in the United States denies recovery in a civil action for the death of a person caused by the neglect or wrongful act of another. This rule descends directly from Lord Ellenborough's famous dictum to the effect that ". . . in a civil court, the death of a human being could not be complained of as an injury".[1] This proposition became the basis for the common law rule as adopted by practically all subsequent cases.

B. *Historic origins of the rule against recovery.* History provides a plausible explanation for Lord Ellenborough's statement. Anglo-Saxon England treated all homicides as private (civil), not criminal wrongs.[2] As in many societies, the existence of the blood feud was relied upon to keep the peace. Every killing brought vengence upon the head of the wrong-doer at the hands of the deceased's kinsmen down to the sixth cousin.[3] Eventually the conflict between the loyalty of the kin and their desire for a quiet life resulted in frequent efforts to end the feud by the payment of just compensation. This punitive payment was paid directly to the kinsmen, the amount depending upon the decedent's social rank.[4]

Further transition, partially caused by expansion of the notion of the "King's Peace," resulted in combining this "wergild" with a fine to the Crown for each homicide.[5] By the 13th century the change was complete with every homicide, no matter how caused, treated as a criminal offense.[6] Accidental or involuntary homicides were not treated as felonies since they lacked the necessary mental element, but the defendant's property nonetheless was forfeited to the Crown.[7] Homicides of this nature were called killings *per infortunium*[8] and were not considered crimes but misfortunes.[9] "Yet, because the king hath lost his subject, and that men should be more careful, he (defendant) forfeits his goods. . . ."[10]

There was no action for damages by the deceased's survivors mainly because his goods being forfeit, the defendant was left "judgment proof." The merger doctrine, that a tort merges into a felony, is no doubt derived from this situation.

It is generally agreed that the *Baker v. Bolton* decision was the product of Lord Ellenborough's confusion between two separate legal doctrines, that expressed by the maxim *actio personalis moritur cum persona* (personal actions die with the person) and that of merger.

The first was certainly not applicable since the plaintiff was suing in his own behalf and not as the decedent's personal representative. The merger doctrine was also a poor basis for denying plantiff his remedy since merger operated only where the act causing death was of a criminal nature.[11] But as pointed out by Dean Prosser, Lord Ellenborough's ". . . forte was never common sense".[12]

C. *The rule in America. Baker v. Bolton,* with its rule based neither upon precedent nor logic, was accepted by nearly all American courts though there is much evidence of hesitation.[13] *Baker* was followed in Massachusetts as early as 1848,[14] and Hawaii seems to be the only American Jurisdiction where an early rejection of the rule has not been overcome by later decision.[15]

Being hesitant to accept an irrational proposition of law, American courts resorted to makeweight arguments on behalf of the *Baker* rule. All of these arguments revolved around the "numberless actions" for damages of an "awful magnitude" which would result from a contrary rule,[16] and the impossibility of calculating the pecuniary value of a life.[17] These arguments carry little conviction when it is realized that most of them were advanced subsequent to Britain's legislative renunciation in 1846 of the old rule that no action exists.

As one noted author has pointed out, the effect of Lord Ellenborough's faulty analysis upon the common law was to make it ". . . more profitable for the defendant to kill the plantiff than to scratch him."[18]

IV. STATUTORY REMEDIES FOR DEATH BY WRONGFUL ACT

A. *Lord Campbell's Act.* The first remedy for wrongful death was created in England in 1846 by the enactment of Lord Campbell's Act. This act reads as follows:

> *9 & 10 Vict Ch 93.* Act for compensating the Families of Persons killed by Accidents
>
> Whereas no Action at Law is now maintainable against a Person who by his wrongful Act, Neglect, or Default may have caused the Death of another Person, and it is oftentimes right and expedient that the Wrong-doer in such Case should be answerable in Damages for the injury so caused by him: Be it therefore enacted by the Queen's most excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal and Commons, in this present Parliament assembled, by the Authority of the same, That whensoever the Death of a Person shall be caused by wrongful Act, Neglect, or Default, and the Act, Neglect, or Default is such as would (if Death had not ensued) have entitled the Party injured to maintain an Action and recover Damages in respect thereof, then and in every such Case the Person who would have been liable if Death had not ensued shall be liable to an action for Damages, notwithstanding the Death of the Person injured and although the Death shall have been caused under such Circumstances as amount in Law to Felony.
>
> II. And be it enacted, That every such Action shall be for the Benefit of the Wife, Husband, Parent, and Child of the Person whose Death shall have been so caused, and shall be brought by and in the name of the Executor or Administrator of the Person deceased; and in every such Action the Jury may give such Damages as they may think proportioned to the Injury resulting from such Death to the Parties respectively for whom and for whose Benefit such Action shall be brought; and the Amount so recovered, after deducting the Cost not recovered from the Defendant, shall be divided amongst the beforementioned Parties in such Shares as the Jury by their Verdict shall find and direct.

III. Provided always, and be it enacted, That not more than One Action shall lie for and in respect of the same Subject Matter of Complaint, and that every such Action shall be commenced within Twelve Calendar Months after the Death of such deceased Person.

IV. And be it enacted, That in every such Action the Plaintiff on the Record shall be required, together with the Declaration to deliver to the Defendant or his Attorney a full Particular of the Person or persons for whom and on whose Behalf such Action shall be brought, and of the Nature of the Claim in respect of which Damages shall be sought to be recovered.

V. And be it enacted, That the following Words and Expressions are intended to have the Meaning hereby assigned to them respectively, so far as such Meanings are not excluded by the Context or by the nature of the Subject Matter; that is to say, Words denoting the Singular Number are to be understood to apply also to the Plurality of Persons or Things; and Words denoting the Masculine Gender are to be understood to apply also to Persons of the Feminine Gender; and the Word "Person" shall apply to bodies Politic and Corporate; and the Word "Parent" shall include Father and Mother, and Grandfather and Grandmother, and Stepfather and Stepmother, and the Word "Child" shall include Son and Daughter, and Grandson and Granddaughter, and Stepson and Stepdaughter.

VI. And be it enacted, That this Act shall come into operation from and immediately after the issuing thereof, and that nothing therein contained shall apply to the Part of the United Kingdom called Scotland.

VII. And be it enacted, That this Act may be amended or repealed by any Act to be passed in this session of Parliament.

1. *Parliamentary intent.* No doubt the inherent injustice of denying a cause of action for death due to another's wrongful act was the motivating factor behind the enactment of this act. As the act's title and preamble state, it was designed to provide compensation for the families of those persons killed ". . . since it is oftentimes right and expedient that the Wrongdoer . . . be answerable in Dam-

ages for the Injury so caused by him: . . ." It must have resulted, at least in part, from a recognition that the rule denying an action for a tortious killing was an accident of history.

2. *Distinctive features of the Act.* Briefly stated, Lord Campbell's act provides that whenever a person's death is caused by the wrongful act, neglect, or default of another under circumstances that would have entitled the party injured to sue for personal injuries had death not ensued, an action may be brought within one year of his death in the name of his personal representative solely for the benefit of certain relatives of the deceased. These relatives include the wife, husband, parents (including stepparents and grandparents), and children (including stepchildren and grandchildren). Parties liable under the act include bodies politic and corporate as well as individuals. The total award is to be determined by the jury according to the damages they may think resulted to the persons for whose benefit the action is brought. This total award, however, is to be divided among the beneficiaries by the personal representative as the jury may direct.

Those features of the act of greatest significance theoretically are the following: (1) an entirely new cause of action was created when death resulted from the wrongful act, neglect, or default of another; (2) the new cause of action was limited to those cases where the deceased would have had a valid cause of action for personal injuries had death not ensued; (3) though the action could be brought only in the name of the deceased's personal representative, the cause of action was actually that of the named beneficiaries to whom recovery was limited; and (4) damages were to be measured and awarded only with respect to the losses suffered by the beneficiaries disregarding any losses, either tangible or intangible, to the decedent or his estate.

B. *Florida's acts affecting wrongful death.* Lord Campbell's Act was followed by the enactment in many states and in Canada of statutes modeled after it. Florida, likewise, created an action for wrongful death during the late 19th century.

1. *Survival Statute.* At common law, not only was a remedy for wrongful death denied, but, similarly, there was a failure to provide a remedy for personal injuries to a person who died either before bringing or before completing a personal injury action. Just as British and American wrongful death statutes of the Lord Campbell's type attempted to create a cause of action for wrongful death, "survival statutes" were enacted to provide a remedy for personal injuries

where the injured person died. Florida's survival statute presently reads as follows:

> F.S. §46.021 *Actions; surviving death of party*
> No cause of action dies with the person. All causes of action survive and may be commenced, prosecuted and defended in the name of the person prescribed by law.

Survival statutes are conceptually different from wrongful death acts since the former permit recovery by the deceased's personal representative for those injuries sustained by the decedent prior to death and the latter provide recovery for the injuries sustained by survivors because of the death itself. The prime difference between the two types of statutes is that the survival statute continues in existence the claim of the deceased himself as an asset of his estate, while the wrongful death statute creates a new claim based upon the death rather than the personal injury, usually for the benefit of the deceased's heirs or next of kin.

Florida's survival statute is mentioned at this point solely to show that the death of a person due to injuries received at the hands of a wrongdoer may result in more than one cause of action based upon the same tortious act. A more thorough discussion of the survival statute, including the damages recoverable thereunder, will be included in a later section of this report.

2. *F.S. §768.01 - Florida's Death Act.* Florida's statute creating a cause of action for wrongful death was originally passed in 1883.[19] A second provision, passed simultaneously, named the parties to the action and defined the damages to be recovered.[20] The current form of Florida's operative death act, roughly corresponding to Section 1 of Lord Campbell's act, appears as follows:

> 768.01 - *Right of action for death.*—(1) Whenever the death of any person in this state shall be caused by the wrongful act, negligence, carelessness or default of any individual or individuals, or by the wrongful act, negligence, carelessness or default of any corporation, or by the wrongful act, negligence, carelessness, or default, of any agent of any corporation, acting in his capacity of agent of such corporation (or by the wrongful act, negligence, carelessness or default, of any ship, vessel or boat or persons employed thereon), and the act, negligence, carelessness or default, is such as would, if the death had not ensued, have entitled the party injured thereby to maintain

> an action (or to proceed in rem against the said ship, vessel or boat, or in personam against the owners thereof, or those having control of her) and to recover damages in respect thereof, then and in every such case the person or persons who, or the corporation (or the ship, vessel or boat), which would have been liable in damages if death had not ensued shall be liable to an action for damages (or if a ship, vessel or boat, to a libel in rem, and her owners or those responsible for her wrongful act, negligence, carelessness or default, to a libel in personam), notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to a felony.
>
> (2) The right of action as set forth in subsection (1) above shall extend to and include actions ex contractu and ex delicto.

The present version of this statute is the result of two amendments. The first occurred in 1915,[21] and added the provision dealing with maritime actions. Although the wording of the statute was also slightly simplified at this time, the parenthetical additions were the only substantive changes. The second amendment occurred in 1953,[22] and added the second paragraph to the act and numbered the paragraphs.

Legislative history of the 1915 amendment is apparently nonexistent[23] though its general intent is clearly manifested by the parenthetical wording. An established principle of maritime law, as well as of common law, is that there is no cause of action for wrongful death due to the tortious acts of another in the absence of state or federal enabling legislation.[24] At the time of the 1915 amendment there were no federal acts providing a right of action for wrongful death occurring on navigable waters within a state's territorial limits.[25] However, as early as 1886, the United States Supreme Court held that in cases involving maritime wrongful death within the territorial limits of a state, federal courts were obliged to enforce state created wrongful death actions but that the ". . . right was subject to the limitations which have been made a part of its existence. . . ."[26] Consequently, whenever a libel *in rem* not based on a federal statute was brought against a vessel in admiralty for wrongful death, the preliminary question facing federal courts was whether the state's wrongful death act contemplated vessels as potential defendants.[27] Since most state statutes seemed to provide only *in personam* actions,

plaintiffs were always in danger of suffering adverse holdings based on the wording of the particular statute involved. Undoubtedly, the parenthetical additions to Florida's death act were intended to serve a dual purpose: (1) to make clear the fact that the act created a cause of action for maritime torts resulting in wrongful death cognizable in admiralty and Florida's substantive law;[28] and (2) to assure federal admiralty courts that the act contemplated actions *in rem* against the offending vessel as well as actions *in personam* against its owners. Seemingly, the parentheses were added merely to show that the amendment was intended for clarification and to prevent a break in the continuity of a statute turgidly worded from the outset.

It is generally agreed that the 1953 addition of the second paragraph to Florida's death act,[29] was the direct result of the Florida Supreme Court's 1951 decision in *Whitely v. Webb's City, Inc.*[30] In that case the court held that a breach of implied warranty of fitness of a foodstuff was not actionable under Florida's death act which contemplated only actions *ex delicto*. The court aligned itself with the jurisdictions which hold that actions *ex contractu* are not maintainable under statutes of the Lord Campbell's type. Though in 1953 legislature no doubt had breach of implied warranty in mind when it amended the act, it is likely that all deaths attributable to breaches of contract are now actionable in Florida due to the statute's plain language.

3. F.S. §768.02 - *Parties and Damages.* The statutory provision defining the parties entitled to recovery and the damages recoverable under the Death Act (§768.01) was also enacted in 1883.[31] Though this statute was intended to cover the matters contained in Section II of Lord Campbell's act, it is immediately noted that the legislature chose to radically depart from the British scheme of compensation. The act reads as follows today with those portions added subsequent to 1883 *italicized:*

> 768.02 - *Parties; damages; proviso.*—Every such action shall be brought by and in the name of the widow or husband, as the case may be, and where there is neither widow nor husband surviving the deceased, then the minor child or children may maintain an action; and where there is neither widow nor husband, nor minor child or children, then the action may be maintained by any person or persons dependent on such person killed for a support; and where there is neither of the above classes of persons to sue, then the action may be maintained by the executor or administrator, as the case may be, of the person killed. *In case of the death of any person solely entitled, or of all the persons jointly entitled to sue, before action brought or before the recovery of a final judgment in action brought by him or them, the right of action or the action as the case may be, shall survive to the person or persons next entitled to sue under this section, and in case of the death of one or more persons jointly entitled to sue before action brought or before the recovery of a final judgment in an action brought by them, the right of action or the action, as the case may be, shall survive to the survivor of such persons so jointly entitled to sue;* and in every such action the jury shall give such damages as the party or parties entitled to sue may have sustained by reason of the death of the party killed; *provided, that any person or persons to whom a right of action may survive under the provisions of this act shall recover such damages as by law such person or persons are entitled in their own right to recover, irrespective of the damages recoverable by the person or persons whom he or they may succeed.*

This statute has been amended a single time when its length was practically doubled.[32] Since it established a strict hierarchy of beneficiaries with the cause of action solely created for the benefit of the person or persons standing in the specified relationship to the deceased, obviously the question would arise as to the disposition of the cause of action should the beneficiary or beneficiaries primarily entitled die before the action was brought or before final judgment. Under the provisions of Lord Campbell's act this question does not arise since in all cases the decedent's personal representative was to recover in behalf of all lineal ascendent or descendent beneficiaries within two degrees of the deceased and actually damaged by the wrongful death. No doubt the failure of the legislature to originally anticipate the "survival" problem may be attributed partially to the absence of such a provision in Lord Campbell's act and partially to the failure of the legislature to fully appreciate the ramifications of its singular departure from the usual Lord Campbell provisions with respect to parties and damages.

The 1907 amendment which added the underlined portions was clearly intended to show that the action contemplated by the legislature was a class action with damages measured solely by the injuries sustained by the members of the class living at final judgment. With

the death of the member or members of a higher class, it was made clear that the right of action was to vest immediately in the members of the class next entitled with damages to be measured only by their own losses.

No cases have been found which raised the questions alleviated by this amendment prior to its enactment. It is likely that the 1907 amendment was thus the result of legislative "preventive medicine" in order to dismiss arguments to the effect that the cause of action provided survived to the estate of a primary beneficiary, or that the damages recoverable by lower class beneficiaries should be measured by those recoverable by the primary class beneficiaries had they survived. In the absence of this amendment, both arguments would have been plausible.

4. F.S. §768.03 *Parties in actions for death of minor child.* This statute is designed to provide a cause of action to the parents of a child wrongfully killed. Originally enacted in 1899,[33] the act provides an action to the child's father for loss of his common law right to the child's services until majority and for the mental pain and suffering of both parents. In the absence of a father, the mother may bring the action. Today the statute appears as follows with those portions subsequently added again *italicized:*

> 768.03 *Parties in actions for death of minor child; damages.*—(1) Whenever the death of any minor child shall be caused by the wrongful act, negligence, carelessness or default of *any individual, or by the wrongful act, negligence, carelessness or default of* any private association or persons, or by the wrongful act, negligence, carelessness or default of any officer, agent or employee *of any private association of persons, acting in his capacity as such officer, agent or employee,* or by the wrongful act, negligence, carelessness or default of any corporation, or by the wrongful act, negligence, carelessness or default of any officer or agent, or employee of any corporation acting in his capacity as such officer, agent or employee, the father of such minor child, or if the father be not living, the mother may maintain an action against such individual, private association of persons, or corporation, and may recover, not only for the loss of services of such minor child, but in addition thereto, such sum for the mental pain and suffering of the parent (or *both* parents) if they survive, as the jury may assess.

> (2) The *right of action as set forth in subsection* (1) *above shall extend to and include actions ex contractu and ex delicto.*

The necessity for adding this enactment to the original statutory scheme adopted sixteen years before was readily accepted by the legislature when it was realized that §768.02 prevented an action by the parents of a deceased child for damages to the parent-child relationship[34] since seldom were the parents ". . . persons dependent on such person killed for a support. . . ." Again it should be noted that this problem would not have arisen under Section II of Lord Campbell's act which involved parents as beneficiaries, and that the necessity for a third death statute is directly attributable to the legislature's unique departure from Section II in defining the parties eligible for wrongful death compensation.

In 1913, the *italicized* portions of paragraph one were added to the statute[35] though in reality it cannot be said that the statute was amended. These portions were included on the original enrolled bill which was passed, but were somehow deleted from the Laws of Florida as published in 1899. This deletion was carried over into the General Statutes of 1906. No doubt this was the result of someone's oversight. Nonetheless, the outcome was to limit the potentially liable parties to corporations and associations. Individuals were left unaffected.[36] In 1913, the wording of the original bill was restored.

The second paragraph providing for *ex contractu* actions was not enacted until 1963,[37] exactly ten years after the very same provision was added to the original death act (§768.01). There is no valid reason why the two additions were not enacted at the same time, and the draftsman of the 1953 amendment to §768.01 probably overlooked the necessity for a similar addition to §768.03. The 1961 case of *Latimer v. Sears Roebuck and Co.*[38] forced the issue when in a lengthy decision a federal court held that the amendment to §768.01 could not be applied to §768.03. The statute was amended to allow *ex contractu* actions at the next legislative session.

C. *Comparison of Florida death acts and Lord Campbell's Act.* Florida's wrongful death acts are in several ways similar to Lord Campbell's act. Both acts create an entirely new cause of action when a death is caused by the wrongful act, neglect, or default of another. The Florida act replaces "neglect" with "negligence" and adds "carelessness" as a basis for liability, but these slight variances in wording are of no legal significance. Both acts also recognize that the cause of action is that of the named beneficiaries to whom recovery is

limited with damages to be awarded according to the losses actually suffered. Recovery is also limited by both statutes to those cases where the decedent would have had a valid cause of action for personal injuries had death not ensued.

At this point, however, the two statutory schemes clearly diverge. The similarities noted above prevent the conclusion that the two statutes are totally dissimilar in theory.[39] Yet, sharp differences appear in the actual operation of the two enactments. First, it is immediately noticed that Florida has established a strict hierarchy of beneficiary classes.[40] This hierarchy determines who possesses the cause of action, who may bring suit, and who may recover damages. Lord Campbell's act requires the deceased's personal representative to bring the action, recovering those damages suffered by the dead person's lineal relatives within two degrees, the Florida act requires that the action be brought by the member or members of that hierarchial class having priority as established by the statute and that damages be limited solely to the members of that class. Also unlike Lord Campbell's act, Florida does not necessarily limit recovery to lineal relatives of the deceased, but includes a separate beneficiary class for any dependent persons. Under Florida's act, the estate of the decedent also is included as a separate beneficiary class provided the deceased was not survived by a prior class. Lord Campbell's act contains no provision for recovery to the estate.

Florida's departure from the usual Lord Campbell provisions was obviously the result of compromise. No doubt many legislators feared that courts of the state would be smothered by wrongful death actions resulting in excessive damages. Others probably felt that Lord Campbell's act was too restrictive as to parties allowed to recover. The compromise remedy finally adopted has bred more ills than it prevented,[41] but, as one author has noted, other states have had similar experiences.[42]

> "(T)he example set by our brothers-in-law across the sea was followed in the United States, but with many unfortunate results. Few of the state acts followed Lord Campbell's Act strictly in language; many used their own conceptions of what the act was about; and most were confused as to the kind of cause of action created. All were agreed, however, that they had adopted Lord Campbell's Act or a reasonable facsimile thereof. The result has been confusion compounded across several states of the United States, and Florida has not been left untouched."

V. SURVEY OF AMERICAN DEATH ACTS AND THE FLORIDA ACTS

A. *Acts giving rise to liability.* The substantive basis of recovery for wrongful death must be determined by reference to the language of any statute purporting to change the common law rule. Lord Campbell's Act provided that there would be liability for the death of a person if death resulted from the ". . . wrongful act, neglect, or default . . ." of the defendant. The statutes of twenty-six states have adopted this language intact. Of the remaining jurisdictions, most have only slightly varied the wording while providing essentially the same basis for recovery.[43] Florida is in the latter category.

Florida Statutes §§768.01 and 768.03 predicate the defendant's liability upon his ". . . wrongful act, negligence, carelessness or default. . ." Why the legislature chose to depart from Lord Campbell's formulation by inserting "carelessness" as a basis for liability is unknown. The negligent man by definition is careless. Perhaps this insertion was the result of a desire for statutory originality. More plausible is the suggestion that it was added to clarify the statute's purpose by inserting a lay term among legal words of art. The term has been accorded no special significance by the courts and may be viewed as surplusage.

1. *Torts.* It is well settled that the commission of a common law intentional tort resulting in the victim's death will qualify as a "wrongful act" for purposes of a wrongful death cause of action.[44] If the death is due to circumstances amounting in law to a felony, the Florida Act expressly prevents the common law doctrine of merger from operating and thereby extinguishing the civil claim. Likewise, if the defendant owes a duty of care to the decedent and breaches that duty causing the decedent's death, an action for wrongful death may be based on negligence. It is important to recognize that the duty breached by the defendant is one owed to the decedent, not to his survivors, even though the losses for which damages are recoverable are usually those suffered by the survivors.

Whether death is the result of intentional or negligent injury must be determined under the substantive tort law of each jurisdiction. Florida law recognizes that an intentional wrongful act causing death is to be distinguished from negligence and that different defenses may apply to intentional and negligent acts though they both create the same cause of action.[45]

2. *Strict Liability.* All jurisdiction recognizing actions for personal injury based upon strict liability without fault permit a wrongful death action where a fatality results from such activity.[46] When first accepted in the United States, strict liability was applied solely to dangerous activities such as dynamite blasting. The recent trend, however, has been the extension of strict liability to many inherently dangerous activities. This has been most striking in the area of defective products liability where a movement has begun to replace breach of warranty with strict liability.[47] There are indications that Florida courts have joined in this movement.[48] It is possible that further changes in the direction of increased strict liability will occur in Florida. Should this development continue, death actions based upon non-negligent "defaults" for which the defendent is strictly liable may be allowed by Florida courts.

3. *Breach of Contract.* It is generally accepted that damages resulting from death caused by a breach of contract are not recoverable under wrongful death statutes of the Lord Campbell type. Recovery for death due to breach of contract was disallowed at common law, and it is often stated that wrongful death statutes were intended only to apply to actions *ex delicto.*[49] Yet, it might be possible for courts to consider a breach of contract a "default" in order to render it actionable under the traditional statutory language.

Florida Statutes §§768.01 and 768.03 expressly provide for wrongful death actions to extend to "actions *ex contractu.*" The legislative history of the 1953 amendment adding this additional basis for liability indicates that death actions based on breach of warranty were mainly contemplated. The clear language of the amendment is not restrictive, however, and no doubt any breach of contract legally causing death is actionable under Florida's death acts.[50]

4. *Breach of Warranty.* Personal injury actions based upon breach of warranty have greatly multiplied in recent years due to the expanded scope of liability in products liability cases. Breach of warranty is a hybrid action containing elements of both contract and tort theory. Earlier cases, emphasizing the *ex contractu* nature of warranty actions, firmly disallowed recovery for wrongful death based upon breach of warranty.[51] The recent trend, however, has been to view breach of warranty as a non-negligent "default" to which strict liability is applicable. The 1953 amendment to F.S. §768.01 was clearly intended to allow a wrongful death action on a breach of implied warranty theory.[52]

5. *Unseaworthiness.* Due care does not discharge the duty of a shipowner to provide a seaworthy vessel for his seamen. Unseaworthiness is a type of strict liability known only to judge-made maritime law.[53] This theory of liability provides a cause of action generally not recognized in state courts since admiralty jurisdiction is vested in the federal courts.

In the absence of Federal legislation, death actions based upon maritime personal injuries occurring within the navigable waters of a state must be brought, if at all, under the provisions of the state wrongful death act.[54] Assuming it is found that a state's act contemplates such actions (as Florida's acts expressly do), the state's substantive law is applicable both with respect to the necessary elements for the cause of action and to available defenses. If the vessel's unseaworthiness is relied upon as the cause of the fatality, the question arises whether unseaworthiness can be the basis of a cause of action under the state's substantive law. The Florida Supreme Court has recently held, in accordance with the majority of states, that substantive principles exclusively maritime in nature are not cognizable in actions brought under Florida's death acts regardless of the fact that the decedent could have relied upon those principles had he lived and sued in the federal courts for personal injuries.[55] This holding applies both to the complaint based upon unseaworthiness and to the maritime defense of comparative negligence.[56]

B. *Theories of Damages.* Since monetary compensation is the object of wrongful death acts, it is not strange that methods of damage computation present the distinguishing characteristics for classifying American wrongful death statutes. Nearly all American statutes are of the Lord Campbell's type with regard to the party liable and to the necessary acts establishing liability. By contrast, there are various theories of damage computation which determine who possesses the cause of action, who is to receive compensation, and what elements of loss may be recovered.

American wrongful death statutes, then, can be classified according to how they compensate for the losses caused by a death-producing act. These losses are of three types. First, there are those damages personal to the decedent. Secondly, there are those economic losses consequent upon the decedent's ceasing to function as an economic unit. The third broad classification of potential damages are those generated by the non-economic loss of the decedent as a unique human being who is valued by his family. Though it is true that the courts and legislatures of the United States have accepted many vary-

ing formulas for compensating these losses, some generalization is possible.

1. *Survival Statutes.* Most states provide survival statutes whereby a cause of action for damages personal to the decedent survives to his estate.[57] A survival action is conceptually different from a wrongful death action since each provides a remedy for a different loss. Unlike most wrongful death acts, survival statutes provide compensation to the personal representative of the deceased for those personal injuries suffered by the deceased up to the date of death. Needless to say, recovery is disallowed where the decedent is killed instantly since no damage to the deceased occurs during his lifetime. Several jurisdictions have adopted hybrid death acts providing for recovery of elements of both survival and wrongful death damages.[57,58] These have bred confusion. It is no doubt better policy to prevent more than one action hased upon the same act, but a mixture in a single statute of two conceptually different theories of damages may be confusing unless clarity can be achieved through careful legislative drafting.

The elements of damages generally recoverable by a decedent's personal representative in a survival action are as follows: conscious pain and suffering, medical expenses, funeral and burial expenses,[59] and loss of earnings to date of death.

In jurisdictions like Florida where the survival action is separate and distinct from an action for wrongful death, the recovered damages are assets of the decedent's estate subject to the claims of creditors, and distributable by will or intestate succession if there is no will.

2. *Loss to Survivors Death Acts.* While survival statutes only compensate the estate of the decedent for those damages personally suffered by him prior to death, wrongful death acts create a new cause of action for damages either to the estate or survivors of the deceased caused by the loss of the deceased as a producing economic unit. Most death acts also permit damages based upon the loss to his family of the decedent as a unique individual. There are many elements of damages which may be considered by a legislature or court when it attempts to compensate for losses caused by an actionable death, and without doubt there are many combinations of damage elements possible. As a concession to the shortness of human life, however, let us generalize with regard to those few combinations which most American jurisdictions have found acceptable and from this gain insight into the underlying policy bases for allowing monetary recovery for wrongful death.

A majority of state and federal death acts adopt the loss to survivors theory of damages. Even where the particular act does not specify how damages should he computed, the courts have generally accepted this theory. The reason for this weight of authority is partially found in the fact that Lord Campbell's Act expressly provided for damages ". . . proportional to the injury . . ." to specifically designated beneficiaries. More convincing is the consideration that the law should most interest itself in the protection of the living who have been injured by the decedent's death. Damages should be computed with an eye toward the losses of those dependents who will actually receive compensation and not toward the decedent or his estate.

Though Lord Campbell's Act provided a rather broad standard for jury awards, it was judicially restricted to pecuniary damages only without any recovery for "sentimental" losses.[60] Most American jurisdictions adopting Lord Campbell's type statutes provide that damages are to be computed in accordance with the losses suffered by the decedent's survivors. A majority of these have also restricted recovery to pecuniary losses, either by statutory provision or by judicial construction of general language. This restriction is for the most part illusory, however, since many courts have been willing to allow the jury to place a pecuniary value upon items difficult to evaluate such as loss of services, companionship, and training. Generally, the pecuniary loss restriction has been applied to prevent recovery for mental pain and anguish of the survivors.

Damages under the loss to survivors theory, then, are awarded for the pecuniary value reduced to present worth of the probable contributions to support which the deceased would have made to the survivors had he lived and for the value of the services which the decedent normally would have rendered to the survivors. In most states this includes the value of a parent's training, guidance, companionship, and education. These items of damages are computed based upon the joint life expectancies of both the decedent and each individual beneficiary. In addition, some states allow recovery for the present value of the probable inheritance the survivors would have received had the decedent lived out his normal life span. In those states having hybrid survival-death statutes, the decedent's medical and funeral expenses are often allowed.

Florida's death acts incorporate the loss to survivors theory of damages. This is singularly complicated, however, by the strict hierarchy of beneficiary classes which F.S. §768.02 erects and by the inclusion of the decedent's estate as a separate beneficiary class in the absence of living dependents. Like Lord Campbell's Act, the Florida statutes,

except for the Wrongful Death of Minors Act (F.S. §768.03), provide little guidance for damage computation. This has resulted in much litigation with questionable results, which the Florida courts have recognized.

Unlike most jurisdictions which usually allow recovery by all dependents of the decedent, Florida prevents recovery except to those highest in the beneficiary hierarchy. Damage computations are dependent upon the identity of the person suing. All persons in fact dependent upon the decedent may recover the present value of lost support or services[61] provided, of course, that they are members of the class entitled to bring suit. In the case of a surviving spouse, damages are also allowed for lost comfort, protection, society, companionship and consortium.[62] In addition, a surviving widow may recover the loss of that amount which she may reasonably have expected to receive as a legacy from her husband's estate.[63] Though Florida does not subscribe to the "pecuniary loss" restriction, a surviving spouse may not recover for mental pain and suffering.[64] In an action by minor children, loss of attention, care, comfort, education and moral training may be compensated[65] as well as lost services and support. Where the decedent is a minor child, F.S. §768.03 authorizes a separate cause of action for the parents who would ordinarily be unable to bring themselves within one of the beneficiary classes of F.S. §768.02. In an action by a parent, the allowable recovery includes loss of the child's services to majority and mental pain and suffering of both parents. In such a situation, there may also be a cause of action under F.S. §768.01 on behalf of the minor decedent's estate.[66]

3. *Loss to estate death acts.* There are basically four types of death acts which measure damages either wholly or partially by the loss sustained by the decedent's estate. Eight jurisdictions have enacted hybrid survival-death acts which are essentially survival actions for the decedent's personal injuries expanded to include damages for wrongful death. Since the cause of action is viewed technically as a survival to the decedent's estate with wrongful death losses added, damages are entirely measured by loss to the estate and are recovered for the benefit of the estate. Although recovery is to the estate, most statutes of this type require distribution to designated statutory beneficiaries. Others, however, treat the recovery as personal property of the estate distributable either by will or intestate succession after payment of debts of the decedent.

The remaining three classes of statutes allowing recovery measured by the loss to decedent's estate are distinguishable from the hybrid

survival-death statutes in that they create an entirely new cause of action. Like most "true" death acts, these statutes do not recognize the cause of action as merely a legal survival of the decedent's estate.

The first group of these statutes are those of the Lord Campbell type which provide only general directions for damage computation by the jury. In several states, the language has been judicially construed to measure damages by loss to the decedent's estate although, once recovered, the damages are immediately distributed to the designated statutory beneficiaries without becoming property of the estate subject to debts and testamentary dispositions.

A second group of "true" death acts measure damages by loss to survivors, but in addition allow the decedent's personal representative to recover certain losses to the estate. These generally are losses resulting from the injury and death such as funeral and medical expenses. Generally, this type of death act is found in jurisdictions either without survival statutes or with death acts expressly preempting the survival cause of action.

The last group of loss to estate death acts measure damages by loss to survivors where they exist, but provide for loss to the estate under specified circumstances. One is Florida's, which provides that if the decedent is not survived by statutory beneficiaries the action "may be maintained by the executor or administrator . . . of the person killed." Under statutes of this type loss to the estate in general may be recovered.

There are three different theories of damage measurement utilized where loss to estate is recoverable. The least important of the three is a recovery based upon the decedent's probable *gross* earnings reduced to present value and without deduction for decedent's personal living expenses. Only a few states accept this method of measurement, and of these it is suspected that there is a desire to compensate beneficiaries for "sentimental" losses in a disguised manner. Georgia, for example, permits recovery of the gross estate only where the action is brought by the spouse or child of the decedent or by the parents of a minor decedent.

The most popular theory of loss to estate measurement is that monetary damages should represent the present value of decedent's probable future *net* earnings. This figure is found by determining the probable future gross earnings of the decedent over his life expectancy and deducting therefrom his probable personal living expenses. The figure is then discounted to present value.

Another theory of recovery to the estate subscribed to by several states is to measure damages by the present value of decedent's prob-

able future accumulations.[67] This is the Florida position when there is no survivor in the three prior classes. Like the probable "net income" theory, this method of measurement relies solely on probable business income without regard to possible investment income.[68] The future accumulations theory, however, requires that the jury determine the amount of decedent's net earnings he would have *saved* and left at his death as part of his estate. Though it is indeed a fine line which separates the "net earning" theory from the "future accumulations" theory, the latter seems more equitable since the jury must not only evaluate the decedent's propensity to earn but also his propensity to save. In Florida, the jury is allowed to consider the habits, skill, age, and health of the decedent in determining his probable accumulations.[69] This approach is probably more difficult to apply, however, since the jury must objectively evaluate the subjective personality traits of the decedent.

VI. DEFECTS IN THE FLORIDA LAW OF WRONGFUL DEATH

Grave difficulties were created by the unique departure from the usual Lord Campbell provisions in F.S. §768.02. The strict hierarchy of beneficiary classes created by this enactment, in the final analysis, must be recognized as the most serious defect. Florida's death acts have caused so much injustice and confusion that the Supreme Court has been prompted to request legislative revision.[70] The ideal death act should require the tortfeasor to respond in one civil action for the actual losses of those living dependents of the deceased. The wrongful death laws of Florida do not achieve this ideal. Further, a great deal of unfairness is possible in Florida to both dependents of the deceased and the tortfeasor.

A. *Mechanics.* Rather than one comprehensive death act providing for one civil action, Florida has four acts that may come into play when a person causes a fatal injury, and they create three different causes of action. The survival statute provides recovery of those damages personal to the decedent suffered prior to death.[71] These include medical and funeral expenses, lost earnings, and mental pain and suffering. This cause of action survives to the decedent's estate and may be brought by his personal representative.

An additional cause of action is created upon death by F.S. §768.01 for the injuries sustained by the survivors of the decedent. F.S. §768.02 provides a hierarchy of beneficiary classes that determines who may sue, who may share in the recovery, and, to some extent, what losses will be compensated. This hierarchy is as follows:

(1) surviving spouse; (2) minor children; (3) other dependent persons; and (4) the decedent's estate. Actually, "estate" is not mentioned; rather, the statute provides that the action may be maintained "by the executor or administrator . . . of the person killed". The cause of action is vested exclusively in the highest beneficiary class. Membership in the highest class has been recognized as an essential element of the cause of action.[72] Members of a lower class cannot sue even if the existing class having priority refuses to do so;[73] the cause of action cannot be assigned to those of a lower class;[74] and only members of the class with priority may recover damages after having alleged and proven the non-existence of a higher class.[75] Unless the beneficiary suing under the death acts is also the decedent's personal representative, the tortfeasor must respond to two separate actions, one for wrongful death and one for surviving personal in-

juries. Even if such joinder is possible, it is not compulsory and the plaintiff may elect to afflict the defendant with two lawsuits.

The damages recoverable under the Florida death acts depend upon the identity of the person suing. These may be briefly summarized according to each statutory class:

(1) Surviving spouse - lost financial support, services, comfort, protection, society and corsortium. Lost inheritance and the existence of minor children may be considered if the support of the minor children has been thrust upon the surviving spouse by the death of the husband and father.

(2) Minor children - lost financial support, services, attention, care, companionship, and educational and moral training.

(3) Other dependent persons - lost support and service only. Damages for these three classes are computed according to the "loss to survivors" theory.

(4) Decedent's estate - lost savings that decedent probably would have accumulated had he lived.

The inclusion of the decedent's estate as the last beneficiary class produces a switch to the "loss to estate" theory of damages and, of course, is dependent upon the non-existence of any person dependent upon the deceased.

Under Florida's fourth act affecting the problem, F.S. §768.03 provides the parents of a deceased minor child with a third and distinct cause of action for loss of the common law right to the child's services and for mental pain and suffering. This is the only death statute providing explicit directions for damage awards and the only one under which mental pain and suffering of the plaintiffs may be recovered. This *Wrongful Death of Minors Act* was created due to the shortcomings produced by the beneficiary hierarchy of F.S. §768.02 since seldom were the parents dependents of their minor children. The problems presented by F.S. §768.03 are a product of the flaws in the earlier death legislation of Florida.

A bad feature of F.S. §768.03 is that it can result in further multiplicity of suits. Though as a practical matter minors seldom have dependents or personal representatives other than their parents, it is not impossible that a tortfeasor would have to respond to three separate civil actions by three separate plaintiffs. Assuming a working minor with a dependent friend or relative other than a parent and who has appointed a personal representative other than a parent by

will, two separate death actions and a separate survival action are theoretically possible. Three causes of action in favor of a parent of a deceased minor child are common, and it is possible for the plaintiff to sue on them separately. Obviously, the possibility of harrassment of the defendant exists.

B. *Factual examples.* The defects in Florida's death acts can be illustrated by examples. To show the mechanics of the act, assume that H, a middle aged man, is negligently killed by T and is survived by a wife, W, a minor son, S, and a minor daughter, D. H also supports his elderly mother, M, who resides with the family. Under Florida law, only W may maintain a death action for damages exclusively personal to her. Although it has long been held that the existence of minor children may be considered by the jury,[76] W's recovery is strictly for her only without a portion allowed exclusively to the children as such. The mother and children of H are without remedy for their loss due to the existence of W. Yet, their losses are no less real. This unfairness can be intensified by assuming the following: (1) W is a second wife to H and a stepmother to the children, and she either chooses not to sue or sues only for herself since she is not responsible for the children's support, or (2)D is an adolescent girl who suffers severe psychologieal trauma due to her father's death and requires psychiatric help. In both cases there is no recovery by the children though their actual losses may be great. The existence of W also precludes any recovery to the estate except under the survival statute, which may produce little for the children after creditors have been satisfied, and there will be no survival action if the death was instantaneous.

Multiplicity of law suits is possible by the fact that both W and the decedent's personal representative may be different persons who must sue T separately, or, even if the same person, may elect to proceed in two separate actions. It has already been shown how the death of a minor may result in a third lawsuit. Assuming that three interests which the law should protect have been dunaged, there is still no sound reason why all three losses cannot be asserted in one civil action.

Another factual example will point out the unsatisfactory situation with regard to damages presented by the Florida death acts. X is a nineteen year old youth fatally injured due to T's negligence who dies after a brief stay in the hospital. To oversimplify, it is assumed that X's gross lifetime earnings may be found to be $200,000 when reduced to present value. The personal representative of X may recover for

the mental pain and suffering of X as well as for his lost earnings to date of death and medical expenses. He will also recover funeral expenses. If X is survived by a wife, she may recover that portion of the $200,000 which the jury reasonably believes would have been spent for her support had X lived. Assuming that X has two small children, that portion of X's probable gross earnings that would have been spent on them is not recoverable except as part of the wife's damages. Similarly, no recovery will be allowed X's estate for that portion of the $200,000 which X probably would have accumulated as savings though this amount would have been recoverable by his estate (fourth class) had X not been survived by immediate dependents. The anomolous result, according to the Florida Supreme Court is that ". . . the wrongdoer (is) required to respond in a less amount of damages if the injured person dies, than if the injured person survives . . ."[77] since if X had lived with a total and permanent disability he would be allowed to recover the present entire value of the $200,000 as impaired earning capacity in addition to his other personal injury damage elements.

A further anomaly results from the fact that a person's earnings normally are spent on family and personal expenses with only the remainder being accumulated as savings. The more dependents a person has, the less he will probably accumulate. F.S. §768.02 allows but one class of dependents to recover to the exclusion of all others. Yet when the decedent is survived by no dependents, his personal representative may recover the entire net estate as accumulated savings, which may be disproportionately large in the absence of dependents. As the Florida Supreme Court has again pointed out, in many cases ". . . it might be said that it is cheaper to kill a person who leaves a spouse or child . . . than it is to kill a person who is survived by no one. . ."[78] Seemingly, the Florida death acts are capable of discriminating against those persons whom the law should most zealously protect in favor of collateral kin, who receive not support but a windfall. Stated otherwise, recoveries are small where actual losses are great, and recoveries are large where actual losses are small. This is indefensible.

This problem becomes particularly disturbing in the case of the wrongful death of a minor child. The parents of the dead child are given a cause of action by F.S. §768.03 for the value of the child's services during minority and for mental pain and suffering presumably because F.S. §768.01 does not permit mental pain and suffering to be recovered and F.S. §768.02 does not even include parents as a class that can sue as such. There is also an action arising under F.S. §768.01,

and usually the only class in existence will be the estate. So the father of the dead child can recover as personal representative of the child's estate the lost accumulations of the child figured from his majority and this amount will be distributed to the child's parents under Florida's laws of intestate succession. As noted in the preceeding paragraph, the probable accumulated savings of a person without dependents—and minors usually are—may be found to be very great. Add this recovery to that possible under F.S. §768.03, and it may be concluded that Florida's death acts theoretically allow the highest recovery in the case of a minor's death where he is survived by parents but by no dependent persons. Parents of minor children, therefore, may not only recover larger pecuniary damages than dependents of decedents generally, but, unlike a surviving spouse and children, are also allowed recovery for mental pain and suffering. This borders on the ridiculous when it is realized that parents are seldom viewed as the primary objects of a person's bounty and that parents seldom need such large recoveries. Why should it be more expensive to kill a minor on whom no one is dependent for support than to kill a breadwinning husband and father?[79]

The theoretical flaws pointed out above have, of course, been held in check to a great extent by the common sense of jurors and by the watchful eye of judges, trial and appellate, which discourage excessive verdicts, but that is no excuse for the death acts of Florida to embody such an irrational and distorted view of public policy. They should, as a minimum requirement, present a picture of theoretical consistency in order to aid the courts, which have trouble enough with the facts of individual cases without having to be concerned with faulty statutes. The Florida death acts have failed to supply our judges and juries with a consistent theory of damage recovery that accords with common sense and public opinion. Large awards where no one needs it, and small awards where there are many dependents is nonsense.

C. *Miscellaneous problems.* There are several other problems with regard to wrongful death worthy of legislative consideration. Some of these have been presented to our courts and have been reasonably resolved by them even though Florida's death acts do not expressly deal with them.

With regard to damages, recovery for the mental pain and suffering of the surviving spouse or children of the decedent has been disallowed under the Florida acts.[80] Though it is the general rule today that damages of this type are not recoverable under the "loss to sur-

vivors" theory, the Legislature of Florida in the Wrongful Death of Minors Act (F.S. §768.03) has clearly manifested a belief that these damages do occur and can be evaluated. Most jurisdictions refuse to allow the mental anguish type of damage because the courts say there is no precise method for arriving at a monetary evaluation. The flaw in this argument lies in the fact that a majority of jurisdictions allow recovery for lost companionship, an element of loss that is also clearly without a price tag. It is also worth noting that, to a large extent, all losses caused by a wrongful death are somewhat speculative. Perhaps the best explanation for the disallowance of mental pain and suffering is a distrust of the jury's competence to arrive at a just award based upon an element of damages that is negative in quality. The emotional effects of a death upon close relatives is distinguishable from those more positive elements of damages such as the money and services that the decedent would have contributed to the survivors had he lived. Yet, most juries at present have adequate opportunity to make awards based upon sentiment and sympathy, and the addition of one more "non-pecuniary" element of loss could make little difference. The justice of such an addition, on the other hand, would particularly manifest itself in those cases where the dependent's mental damage has resulted in positively identifiable physical or psychiatric illness. These damages can reasonably be established through expert medical testimony. Medical science is not so helpless in assessing mental anguish and its effects as it was when the rule disallowing this damage element was adopted by the courts.

Another problem is the protection of the decedent's general creditors. General creditors of the decedent have priority in survival statute recoveries as against the decedent's survivors. Further, all wrongful death recoveries by the estate in the absence of dependents under F.S. §768.02 are subject to the claims of creditors. The problem arises solely in the case of the surviving spouse who may recover her lost inheritance without its being subject to the claims of creditors. Firmly established is the legal policy that no beneficiary of an estate should be allowed to receive his legacy prior to the satisfaction of decedent's creditors.

The problem of creditors' claims cannot be discussed without also considering the question of recovery for lost inheritance by statutory beneficiaries other than widows. Probable inheritance of statutory beneficiaries is recognized in the majority of "loss to survivors" jurisdictions as a valid expectancy to be legally protected. Florida courts allow recovery for a widow's probable inheritance, but not for that of minor children or other dependents. The difficulty with computing

lost inheritance is that the jury, in addition to computing the other losses to survivors, must also determine the decedent's probable accumulations and the likelihood of a portion being left to the particular beneficiary. Yet, if this difficulty is not controlling where widows are concerned, why are children not allowed a recovery of their expectancy also?

The allowance of an inheritance recovery under the "loss to survivors" theory may be undesirable in two respects. First, it permits payment of what is much like a legacy direct to the beneficiary without its having passed through the decedent's estate thereby becoming subject to the claims of creditors. Secondly, it may be unfair to the defendant, whose liability may be based on simple negligence, to be required to act as an insurer of a legacy to the parents or collateral relatives of an unmarried decedent who neither need nor expect such a windfall since they would not normally be the objects of the decedent's bounty. One solution to this problem would be to shift a "loss to estate" theory so as to permit, as additional damages, recovery by the personal representative of the net accumulations for purposes of preserving expectancies.[81] This recovery would be subject to the claims of creditors, distributable by will or by intestacy, and could be disallowed except where the decedent is survived by a spouse or children, the most natural objects of his bounty.

Another aspect of the wrongful death problem not clearly covered by Florida's death acts concerns the rights of adopted and illegitimate children.

In summary, the following are the major problem areas in Florida's death acts:

(1) The strict hierarchy of beneficiary classes established by F.S. §768.02, which blocks recovery of real losses.

(2) The possibility of multiple causes of action based on a single tortious act resulting in court congestion, complexity, and possible harrassment.

(3) The absence of guides for damages computation including a specification of recoverable elements.

VII. RECOMMENDATIONS FOR REVISION

1. Replace the three death acts with a comprehensive Wrongful Death Act.

2. The comprehensive act should be remedial, not punitive, and a policy statement should require a liberal interpretation where justice demands.

3. The personal representative of the decedent should recover on behalf of all eligible survivors and the estate, if the estate is to recover, in one civil action. If there is to be a recovery on behalf of all beneficiaries, the personal representative of the decedent is the most logical plaintiff.

4. Although the act should contain an expanded "loss to survivors" theory of damages, a recovery should be allowed the estate for losses heretofore allowed under the survival statute, and lost accumulations should be recoverable to the estate under certain defined circumstances. No longer should a separate surviving cause of action be allowed the estate for personal injuries of the deceased where the injury has resulted in a wrongful death, but all damages would be recoverable in the wrongful death action.

5. Potentially liable parties should be simplified to specify any person or watercraft. This would neither contract nor expand those parties presently liable, and would dispense with some of the admiralty terms and turgid language currently found in F.S. §768.01.

6. Liability should be based upon the wrongful act, negligence, default, or breach of contract or warranty of the defendant. "Carelessness" as a term of art is synonomous with "negligence" and omitting it will leave the meaning unchanged. As to "breach of contract," there is no reason to write Florida statutes in Latin. "Warranty" needs to be mentioned to avoid confusion arising from developments in strict liability.

7. No wrongful death action should be recognized except in those cases where the decedent could have recovered for personal injuries had he survived.

8. Damages should be calculated from the *time of injury*, not from the time of death. This will permit the recovery of damages now recoverable in a separate survival action for personal injury, except for pain and suffering of the decedent. This recognizes the fact that the dead are beyond compensation for either physical or mental suf-

fering. The personal representative should also be allowed to recover on behalf of the decedent's survivors in the following manner utilizing the "loss to survivors" theory:

a. A spouse and all blood relatives dependent in whole or in part upon the decedent should be allowed to recover the full value of lost support and services calculated from the time of injury to date of judgment plus interest. The present value of future lost support and services may also be recovered.

b. A surviving spouse should also recover for lost companionship and protection as well as for mental pain and suffering to be calculated from the date of injury. Loss of consortium should not be compensated as such since this legal term of art is misunderstood by many jurors to represent merely sexual activity.

c. Surviving minor children also should be allowed to recover lost parental companionship, instruction, and guidance. A recovery for their mental pain and suffering should also be recoverable from the date of injury. The recovery should not be restricted to legitimate children.

d. Parents of a deceased minor child should also be allowed to recover mental pain and suffering from the date of injury.

9. Those damages recoverable by the personal representative on behalf of the estate utilizing the "loss to estate" theory should include the following:

a. Loss of earnings of the decedent from the date of injury to the date of death less lost support of survivors. These losses should not be computed beyond the death *unless* the decedent is survived by a spouse or lineal descendants. If this is the case, net accumulations should also be calculated for the decedent's life expectance and reduced to present value. Any recovery of net accumulations should be distributed either by will or the Florida probate law after having first satisfied the claims of creditors.

b. Hospital and medical expenses and funeral expenses should be recoverable by the personal representative or by a survivor who has actually paid them.

c. The decedent's pain and suffering should not be allowed since this element of damage has had substituted for it the pain and suffering of close relatives.

10. Each survivor's share shall be separately stated in the verdict of the trier, and the recovery allowed the estate shall also be separately stated.

11. The court in its discretion should be allowed to protect the amounts recovered for minor children and incompetents by the personal representative.

12. Compromise settlements must receive court approval to be effective if any survivor is a minor or incompetent or if any survivor objects to the proposed compromise.

13. The award to each survivor and the estate should each bear a share of the expenses of litigation including attorney fees in proportion to the amount awarded to each.

NOTES

1. Baker v. Bolton, 1 Camp. 493, 170 Eng. Rep. 1033 (1808).
2. S. SPEISER, RECOVERY FOR WRONGFUL DEATH 4 (1966).
3. A HARDING, A SOCIAL HISTORY OF ENGLISH LAW 14 (1966).
4. *Id.* at 13 - 15.
5. *Id.* at 15.
6. Prior to the development of negligence doctrine, all accidental killings were considered criminal regardless of whether the defendant was morally responsible. Hay, *Death as a Civil Cause of Action in Massachusetts*, 7 HARVARD L. REV 170, 171 (1893).
7. HARDING, *supra* note 3 at 64.
8. *Id.*
9. SPEISER, *supra* note 2 at 5.
10. Hale, P. C., vol. i, p. 476.
11. Smedley, *Wrongful Death—Basis of the Common Law Rule*, 13 VANDERBILT L. REV. 605, 614-616 (1960).
12. W. PROSSER, TORTS 924 (3d. ed. 1964).
13. SPEISER, *supra* note 2 at 7.
14. Carey v. Berkshire R. R. Co., 55 Mass. 475 (1848).
15. Kake v. Horton, 2 Hawaii 209 (1860).
16. *See, e.g., Conn.* Mut. L. Ins. Co. v. New York and N. H. R. R. Co., 25 Conn. 265, 272-273 (1856).
17. *See, e.g.*, Hyatt v. Adams, 16 Mich. 180, 191-192 (1867).
18. PROSSER, *supra* note 12 at 924.
19. Laws 1883, c.3439, §1.
20. Laws 1883, c.3439, §2.
21. Laws 1915, c.6913, §1.
22. Laws 1953, c.28280, §1.
23. *See*, Moragne v. State Marine Lines, Inc., 211 So. 2d 161, 166 (1968).
24. Comment, 20 U. FLA. L. REV. 411 (1968).
25. Subsequently several federal acts have been enacted designed to compensate persons or their families for maritime personal injuries or death. *See*, Death on the High Seas Act, 46 U. S. C. §§761-68 (1965); Jones Act, 46 U. S. C. §688 (1965). Often, however, persons killed on the navigable waters of a state are unable to bring themselves within the coverage of a federal statute. In such a case, the state wrongful death act controls. Moragne v. State Marine Limes, Inc., *supra* note 23.
26. The Harrisburg, 119 U. S. 199 (1886).
27. This problem still otten arises. *See* The Tungus v. Skovgaard, 358 U. S. 588 (1959).
28. Moragne v. State Marine Limes, Inc., *supra* note 23.
29. Laws 1953, c.28280, §1.
30. 55 So. 2d 730 (Fla. 1951).
31. Laws 1883, c.3439, §2.
32. Laws 1907, c.5648, §1.
33. Laws 1899, c.4722, §1.
34. Klepper v. Breslin, 83 So. 2d 587 (Fla. 1955); Nolan v. Moore, 88 So. 601 (Fla. 1921).

35. Laws 1913, c.6487, §1.
36. *See* Davis v. Florida Power & Light Co., 60 So. 759 (Fla. 1913) for a discussion of this statute's unique history. It was held that the act did not violate fourteenth amendment due process by discriminating against corporations. *Id*
37. Laws 1963, c.469, §1.
38. 285 F.2d 152 (5th Cir. 1961).
39. One member of the Florida Supreme Court feels that Florida's death acts ceased to be of the Lord Campbell's type when in 1953 the Legislature provided for *ex contractu* recovery Moragne v. State Marine Lines, Inc., *supra* note 23 at 168. However, this does not necessarily follow since breach of contract could be construed as a "default" under traditional Lord Campbell's Act language. SPEISER, *supra* note 2 at 48.
40. Beneficiary classes appear in the following order: (1) Spouse, (2) Minor children, (3) Other persons in fact dependent, (4) Personal representative in behalf of estate. FLA STAT. §768.02 (1967).
41. *See* Note, *Florida's Wrongful Death Law: Time for a Change*, 18 U. FLA. L. REV. 637 (1966).
42. Alpert, *The Florida Death Acts*, 10 U FLA L. REV. 153, 156 (1957).
43. S. SPEISER, supra Note 2 at 29-30.
44. *See, e.g.*, 2 HARPER & JAMES, TORTS §24.3 (1956).
45. Wirt v. Fraser, 30 So. 2d 174 (Fla. 1947) holds that contributory negligence may not be interposed as a defense to an intentional wrongful act.
46. *See, e.g.*, 2 HARPER & JAMES, supra note 44.
47. *See, e.g.*, Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 377 P.2d 897 (1962).
48. Bernstein v. Lily-Tulip Cup Corp., 177 So. 2d 362 (3d D.C.A. Fla. 1965), *Cert. denied*, 181 So. 2d 641 (Fla. 1966); Royal v. Black & Decker Manufacturing Co., 205 So. 2d 307 (3d D.C.A. Fla. 1967).
49. Whitely v. Webb's City, Inc., 55 So. 2d 730 (Fla. 1951). This case was decided before the 1953 amendment and was undoubtedly the cause of it.
50. S. SPEISER, *supra* note 2 at 48 cities the Florida act in support of this proposition.
51. Whitely v. Webb's City, Inc., *supra* note 49.
52. Green v. American Tobacco Co., 154 So. 2d 169 (Fla. 1963).
53. Moragne v. State Marine Lines, Inc., *supra* note 23.
54. *See, e.g.*, The Tungus v. Skovgaard, 358 U. S. 588 (1959).
55. Moragne v. State Marine Lines, Inc., *supra* note 23.
56. Bilbrey v. Weed, 215 So. 2d 479 (Fla. 1968), *remanding* 201 So. 2d 771 (2d D.C.A. Fla. 1967).
57. *See*, FLA. STAT §46.021 (1967).
58. For example, Louisiana, Maine, New Hampshire, and Tennessee.
59. It has recently been held by implication that funeral expenses must be recovered in a survival action if at all. Sinclair Refining Co. v. Butler, 190 So. 2d 313 (Fla. 1966).
60. Blake v. Midland Ry., 118 Eng. Rep. 35 (Q.B. 1852).
61. Duval v. Hunt, 34 Fla. 85, 15 So. 876 (1897).
62. Lithgow v. Hamilton, 69 So. 2d 776 (Fla. 1954); Bowie v. Reynolds, 161 So. 2d 882 (1st D.C.A. Fla. 1964).

63. Seaboard Air Line R. R. Co. v. Mattox, 62 So. 2d 51 (Fla. 1952); Southern Utilities Co. v. Davis, 92 So. 683 (Fla. 1922).
64. St. Johns Electric Co. v. Lawler, 105 So. 818 (Fla. 1925).
65. Triay v. Seals, 109 So. 427 (Fla. 1926).
66. *See, e.g.*, Miami Dairy Farms v. Tinsley, 155 So. 850, 851 (Fla. 1934).
67. Florida E. Coast Ry. v. Hayes, 64 So. 504 (Fla. 1914).
68. Louisville & N. R. Co. v. Jones, 34 So. 246 (Fla. 1903).
69. Jacksonville Elec. Co. v. Bowden, 45 So. 755 (Fla. 1908).
70. *See* Ellis v. Brown, 77 So. 2d 845 (Fla. 1955).
71. FLA. STAT. §46.021 (1967).
72. Steffan v. Zernes, 124 So. 2d 495 (1st D.C.A. Fla. 1960).
73. Benoit v. Miami Beach Elec. Co., 96 So. 158 (Fla. 1923).
74. Clar v. Dade County, 116 So. 2d 34 (3d D.C.A. Fla. 1959).
75. Benoit v. Miami Beach Elec. Co., *supra* note 73.
76. Director Gen. of R. R.'s v. Into, 91 So. 269 (Fla. 1922).
77. Ellis v. Brown, *supra* note 70.
78. *Id.*
79. Other horrible hypothetical examples are described in Dietrich, *Florida's Wrongful Death Law: Time for a Change*, 18 U. FLA. L. REV. 637 (1966).
80. *See, e.g.*, Southern Utilities Co. v. Davis, 92 So. 683 (Fla. 1922).
81. Anderson, *A Model State Wrongful Death Act*, 1 HARV J. LEGISLATION 28 (1964), accepts this equitable approach.